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91-489

No. 91-

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

OMAHA INDIAN TRIBE, TREATY OF 1854, ORGANIZED
PURSUANT TO THE ACT OF JUNE 18, 1934 (48 STAT.
984; 25 U.S.C. 476) AS AMENDED,

Petitioner,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY; JOHN R. WILSON; CHARLES E. LAKIN,
FLORENCE LAKIN; R.G.P., INC., AN IOWA
CORPORATION; HAROLD JACKSON; OTIS PETERSON;
DARRELL L. HAROLD, and LUEA SORENSON;
STATE OF IOWA and IOWA DEPARTMENT OF
NATURAL RESOURCES, *et al.*,

Respondents.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT CO., et al.,

Defendants.

**FILED
SIOUX CITY DIV. OFFICE
NORTHERN DISTRICT OF IOWA
11:10 am
MAY 29 1990
WILLIAM J. KANAK - Clerk
By: M. Hoch, Deputy**

JUDGMENT

Pursuant to the memorandum and orders of May 7, 1990, and May 24, 1990,

IT IS ORDERED that the unconsolidated portion of Case No. C75-4- 67 is dismissed with prejudice.

Dated May 24, 1990.

BY THE COURT

/s/ Warren K. Urbom

United States District Judge

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL
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Defendants.

**FILED -
SIOUX CITY DIV. OFFICE
NORTHERN DISTRICT OF IOWA
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WILLIAM J. KANAK - Clerk
By: M. Hoch, Deputy**

**MEMORANDUM AND ORDER ON
PLAINTIFF'S PROPOSED PRETRIAL ORDER AND ON
DEFENDANTS' MOTIONS TO DISMISS**

This matter is before me on motions to dismiss with prejudice filed by the defendants State of Iowa and the Iowa Department of Natural Resources, (Filing 460); Harold Sorenson, a/k/a Harold M. Sorenson, Luea Sorenson and Darrell Sorenson, (Filing 462); Charles and Florence Lakin, R.G.P. Inc., and Otis Peterson, (Filing 463), Ag-

ricultural & Industrial Investment Co., (Filing 465); Edna Boulden Miller, et. al., (Filing 468); James McGuire and Myron Barton, (Filing 469); and John R. Wilson, Personal Representative of the Estate of Roy Tibbals Wilson, Deceased, (Filing 470). The plaintiff Omaha Indian Tribe has filed a response entitled "Motion to Have Honorable Warren K. Urbom Hear and Determine Issues Presented Here and Response to Defendants' Motions to Dismiss With Prejudice". (Filing 472). Replies to the plaintiff's response have been filed by the defendants Agricultural & Industrial Investment Co., (Filing 473); State of Iowa and the Iowa Department of Natural Resources, (Filing 474); Edna Boulden Miller, et. al., (Filing 476); and John R. Wilson, R.G.P. Inc., and Donald L. Rupp, (Filing 477). The defendants have moved for involuntary dismissal of the plain tiff's case pursuant to Fed. R. Civ. P. 16(f), (failure to obey a scheduling or pre-trial order); 41(b), (failure to prosecute or comply with rules or order of the court); and 58, (entry of judgment).

THE PROPOSED PRETRIAL ORDER

The issue before me now is whether the proposed pre-trial order (PPTO) presented to the court on October 16, 1989, along with a motion to file the PPTO, is in compliance with the court's order of June 9, 1989. (Filing 263). After extensive review of the PPTO, and after lengthy consideration of the objections raised by the defendants in their motions to dismiss and of the responses by the plaintiff, I conclude that the PPTO fails to comply with the June 9, 1989, order.

First, the plaintiff has failed to make a good faith effort to arrive at any undisputed facts. The extremity of the failure is evidenced by the plaintiff's failure to agree even that the Omaha Indian Tribe is governed by a body known as the Tribal Council, or that the State of Iowa was admitted to the Union by an act of Congress on December 28, 1846.

Second, the plaintiff's statement of legal issues is inadequate and contains allegations upon which this court and the 8th Circuit have previously ruled. Specifically, the plaintiff alleges that it is improperly being forced to submit to a "retrial" of the same issues because the first case is *res judicata* to the present case. This issue was previously discussed at length and rejected by Judge McManus in Filing 210. The plaintiff also raises the issue of whether the Tribe can be bound by the "forced fraudulent representation" of Evan Hultman and others, and whether Hultman "sold out" the Tribe in the first case. This argument is frivolous. The Eighth Circuit has ruled that it was frivolous in *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089, 1092 (8th Cir. 1988). A motion in limine was granted on October 5, 1989, prohibiting the plaintiff from referring to its fraudulent representation claims. To raise this issue again in the PPTO is to disregard the previous findings of this court and the court of appeals.

Third, and most significantly, the plaintiff failed to disclose six alleged avulsions in Tracts II and III. The defendants learned of these avulsions only after deposing the plaintiff's expert witnesses. The seriousness of this failure to disclose is apparent from the fact that the outcome of this case depends on whether the Missouri river moved by accretion or avulsion.

The first of the undisclosed avulsions became known to the defendants during the deposition of Elmer Clark, one of the plaintiff Tribe's experts, on or about October 11, 1989. (See Filings 405, 406, 407, 408 and 428). Clark revealed the existence of an alleged avulsion in Monona Bend that occurred sometime between 1879 and 1890. (Filing 418, p. 430 of depo.). Clark also stated during his deposition that he had informed counsel for plaintiff (Veeder) of this claim prior to the filing of the case. (Filing 428, p. 240 of Clark depo.).

On October 24, 1989, during the deposition of another of the plaintiff's experts, Dr. Charles Robinson, Veeder admitted that his factual contentions in the Tracts II and III PPTO failed to include two more avulsions; one that occurred in 1912-1923 in the northern segment of the Omaha Mission Bend, and another that occurred between 1929 and 1956 in the lower segment of the Omaha Mission Bend. (Filing 419). Veeder stated that he deeply regretted the oversight and that he assumed full responsibility. He stated that he did not mean to be deceitful, but rather it was simply an inadvertence that had occurred because he "didn't take the time to check the language against the exhibits." (Filing 419, p. 2 of depo.).

On October 26, 1989, during the deposition of plaintiff's expert Doyle Abrahamson, the defendants learned for the first time of another alleged avulsion occurring in Monona Bend sometime around 1929. (Filing 431, exhibit A). Abrahamson testified that he had known about the avulsion since 1975 and that Veeder had also been aware of it since that time. (Filing 431, exhibit A, p. 7).

Finally, Agricultural states in its second supplemental objection to the PPTO (Filing 431), that during the deposition testimony of Dr. Charles Robinson on October 26, 1989, two more alleged avulsions were revealed, one in Monona Bend in 1912-1923, and the other in lower Monona Bend in 1928-1930. They state that the transcript of this is not yet available. (Filing 431 was filed one day after the deposition. A review of the record indicates that a copy of that deposition has not yet been filed.)

None of these avulsions was disclosed in answers to interrogatories or in the PPTO. Similarly, the plaintiff did not include this information in his summary of witnesses' testimony.

All this has added significance because the Tribe through its counsel has maintained repeatedly throughout this lit-

igation that the defendants' counsel had all the evidence of avulsions that the plaintiff's experts had.

The defendants learned that plaintiff's expert Abrahamson would be testifying as an expert on river hydrology and morphology for the first time during his deposition. Abrahamson was not so described in the PPTO. (Filing 439). Similarly, it was first learned during the deposition of Charles P. Corke, one of plaintiff's experts, that Corke would testify as an expert on river hydrology and morphology. (Filing 437).

HISTORY

A review of the history of this case shows a pattern of refusal to comply with discovery order.

In his June 15, 1987, order, Judge McManus stated that it had come to the court's attention that matters filed in this case (that is, the second case) had been misfiled in the previous case, and ordered all parties to file a list of past filings that should be maintained as part of this case by July 13, 1987. It was further ordered that, by no later than July 31, 1987, the parties file a report pursuant to local rule 2.4 including a statement of the status of the case and a complete updated list of the parties and attorneys who must be served.

On the court's own motion dated September 9, 1987, the court noted that the plaintiff Tribe had not complied with the June 15, 1987, order, and directed the Tribe to comply by no later than September 23, 1987. (Filing 128).

On September 24, 1987, the plaintiff responded by protesting that the June 15 and September 9 orders were part of the illegal attempts to force the plaintiff Tribe to retry the litigation that had already been concluded in the Blackbird Bend area. Because of the pendency of the appeal in the first case and the fact that there had been a full trial on the merits, the plaintiff contended that it would

be virtually impossible to respond to a report pursuant to Rule 2.4. (Filing 134).

After a status conference before Magistrate Jarvey on July 27, 1988, defendant Iowa served interrogatories and a request for production of documents on the plaintiff. On August 18, 1988, the plaintiff filed a motion for an extension of time until September 26, 1988, to interpose objections or otherwise respond. (Filing 168). That motion was granted on August 29, 1988, and plaintiff was given until September 26, 1988, to respond. (Filing 172).

On September 27, 1988, plaintiff filed an objection to the interrogatories and request for production of documents on the grounds that they were not tendered in good faith and that discovery at this point was simple harassment. The plaintiff argued that the defendants had the entire record of the trial on the merits, and that they were therefor fully aware of all the expert testimony regarding river morphology. The plaintiff requested that the court suspend all discovery until the court determined from the record at trial which evidence it perceived to be probative, and further, to require the parties to exhaust the record of the trial, which was the best source of information regarding the Tribe's witnesses, their testimony and the evidence in support of their conclusions.

Following this, the defendants moved to compel discovery. (Filing 176, 178, 180). The defendant Iowa moved for sanctions against the plaintiff based on its failure to serve answers to its interrogatories or to provide any good-faith basis for its failure to comply. (Filing 180). Iowa argued that this was the second time in two years that the Tribe had failed to comply with discovery requests. Previously the court had dismissed plaintiff's damage claims on land inside the Barrett survey as a sanction for discovery violations. Iowa attached a copy of that order (dated December 1, 1986) to its motion. The 1986 order stated that the court had previously entered an order on November

17, 1986, directing the Tribe to answer interrogatories, produce documents, and file a statement of compliance by no later than November 26, 1986. The court further stated that the plaintiff's response filed on November 28, 1986, was totally unresponsive and therefore failed to comply.

On January 26, 1989, Magistrate Jarvey granted the defendants' motions to compel, but served ruling on the motion for sanctions. (Filing 196). The Tribe was ordered to answer interrogatories 1 through 17 and comply with the request for production of documents. The plaintiff was given until April 1, 1989, to designate its expert witnesses in full compliance with Fed. R. Civ. P. 26(b) (4) (A) (i), and all discovery was to be completed by August 1, 1989.

On February 2, 1989, the plaintiff filed a motion to reconsider the January 26, 1989, ruling and renewed its request to stay all proceedings. (Filing 197).

On February 27, 1989, defendant Agricultural moved for an order compelling the plaintiff to answer its interrogatories and request for production of documents. (Filing 203).

The plaintiff's motion to stay was denied on March 24, 1989. In his order, Judge McManus detailed the history of the plaintiff's failure to comply with court orders in the first case. Because of the length of the document I have attached a copy to this memorandum, rather than recite its discussion. The court ordered that this case be dismissed with prejudice, unless the Tribe and Veeder comply with each of the orders discussed by no later than April 10, 1989, or show cause why they should not be required to do so. Finally, the plaintiff's motion to declare the court's final judgment and decree in the first case *res judicata* to this case was denied. (Filing 210).

On April 7, 1989, defendant Wilson moved to dismiss the case as a sanction for plaintiff's failure to answer the interrogatories, produce documents, or designate witnesses

by April 1, 1989, as required by the court's order of January 26, 1989.

The plaintiff responded that the names of its expert witnesses and their testimony, together with all the exhibits, received at the first trial, were known to the court and the defendants. (Filing 218).

On May 2, 1989, the court again ordered that plaintiff designate its expert witnesses, this time by no later than May 15, 1989, and complete its depositions by June 15, 1989. The court also denied a motion for the plaintiff to stay discovery. (Filing 235).

Ten days later the plaintiff filed its request for an order relieving it of the obligation to respond to interrogatories and all other discovery pertaining to damages until the issue of title to the land had been resolved. (Filing 238).

On June 6, 1989, the magistrate stated that the plaintiff had responded to some interrogatories, but had failed to answer the interrogatories concerning damages. It further found that plaintiff had not designated its experts, except for its statement that it intended to rely on the same evidence in the record from the prior trial.

The court noted that plaintiff had not answered discovery requests despite specific court orders. Instead, the plaintiff appeared to rely on the filing of additional motions to reconsider and motions to stay rather than comply with court orders. Because nothing had persuaded the plaintiff to respond to these court orders, sanctions were appropriate. The magistrate held that because the plaintiff had failed to designate its expert witnesses and would not designate expert testimony in addition to that presented at the first trial, the plaintiff would be limited to the expert opinions given at the first trial. Because of plaintiff's failure to provide discovery introducing evidence on that issue at trial.

On June 9, 1989, the magistrate scheduled a final pretrial conference for September 8, 1989, at 11:00 a.m. and ordered the parties to meet prior to that time to prepare and sign a proposed pretrial order. In his order he set out the information required to be contained in the proposed pretrial order and, in addition, attached a copy of the local rules to be followed. (Filing 263). On August 18, 1989, the final pretrial conference was rescheduled to 1:00 p.m. on September 8, 1989. The magistrate again ordered the parties to submit a proposed pretrial order by not later than September 1, 1989. (Filing 315).

The parties met on August 22 and 23, 1989, to prepare the proposed pretrial order. Soon after this meeting the defendants filed motions for sanctions, alleging that the plaintiff and its attorney were substantially unprepared to participate at the meeting and had failed to participate in good faith. The motions also alleged that the proposed pretrial order sent by the plaintiff to the defendants on or about September 6, 1989, did not comply with the form required by the June 9, 1989, order.

The pretrial conference was held on September 8, 1989. In his order dated September 13, 1989, the magistrate described the September 8 hearing as one in which the court was unable to accomplish virtually any of the objectives of a final pretrial conference due to the complete failure to provide an acceptable proposed pretrial order as directed in his June 9, 1989, order. The plaintiff was ordered to submit a revised proposed pretrial order on or before September 25, 1989. (Filing 332).

On September 29, 1989, Judge McManus considered the plaintiff's appeal of the magistrate's order of June 6, 1989, that prohibited the plaintiff from calling additional expert witnesses. (Filing 370). The judge concluded that the magistrate had been correct in finding that the plaintiff had failed to provide any meaningful statement of opinions and facts about which the experts were expected to testify and

had failed to provide a summary of the grounds for each expert's opinion. It found that "[t]he Tribe has violated both the letter and the spirit of FRCP 26(b)(4)". Notwithstanding this fact, the court reversed the sanction imposed on the ground that the plaintiff had disclosed the names of its experts and that the defendants were familiar enough with the litigation that they would not be severely prejudiced by allowing the plaintiff's additional experts to testify. The court also noted that the proposed pretrial order that was to have been filed by the plaintiff on or before September 25, 1989, had not been filed. The plaintiff had instead filed a motion to reconsider the magistrate's order of September 13, 1989, which had directed the plaintiff to file the proposed pretrial order by September 25, 1989. (Filing 347). In response to this motion Judge McManus stated:

The Tribe's dismal history of noncompliance with the orders of this court is well documented. The Tribe's failure to submit the revised proposed final pre-trial order on time is yet another example of its noncompliance. The mere filing of the Tribe's motion did not stay or extend the deadline, and the Tribe relies upon such tactics at its peril. This matter shall be dismissed with prejudice unless by not later than noon, Monday, October 16, 1989, the Magistrate has received from the Tribe the previously required revised proposed final pre-trial order in the form required by this court. The Tribe is warned that no intervening motion shall operate to stay or extend this deadline. (Filing 370, p. 4)

The court then ordered that the matter would be dismissed in its entirety, with prejudice, if the above-quoted requirements were not met. (Filing 370).

On October 5, 1989, Judge McManus considered the defendants' motions for sanctions relating to the meeting on August 22-23, 1989, and held that, pursuant to Fed. R. Civ. P. 16(f), the defendants were entitled to an award

of all of their reasonable fees and expenses related to their attendance at the meeting. In support of this order for sanctions the court stated:

Upon review of a transcript of the preliminary pretrial hearing held on August 22 and August 23, 1989, the court finds that the Tribe was unprepared, combative, and failed to endeavor in good faith to satisfy the purpose of that conference or the final pretrial conference held in Sioux city on September 8, 1989. Perhaps the best characterization of the Tribe's lack of good faith came early in the conference when one of the defendants was inquiring about the Tribe's failure to bring a proposed statement of undisputed facts to the conference. In reply, the Tribe's counsel made the following remark: "I never agreed on anything in 13 years. We'll just go ahead that way" (T.19). (Footnote omitted). The Tribe's lack of preparation and failure to follow the court's standard form for pretrial orders resulted in the Tribe's submission of a wholly unacceptable proposed final pretrial order, and a substantially futile pretrial conference on September 8, 1989. Due to the Tribe's lack of good faith, submission of the final pretrial order has been delayed and another hearing will have to be held. Sanctions against the Tribe are appropriate. (Filing 383, p. 5).

On October 16, 1989, the plaintiff filed a "Motion to File Pre-Trial Order" asking the court to accept the accompanying proposed pretrial order. In its motion the plaintiff argued that the required form of the pretrial order was not suitable for actions of this character. The plaintiff went on to say that, while it had attempted to conform to the requirements of a pretrial order, "[t]he magnitude and complexities of the issues; the listing of well over 500 exhibits by the parties, and an equal number of objections to those exhibits have created a tremendous burden upon plaintiff Tribe. . ." (Filing 401, p. 2). The plaintiff further

argued that although the court granted it until October 16, 1989, to file the proposed order, the court also ordered the plaintiff to make available its experts for depositions in Sioux city which resulted in plaintiff's counsel being away from his office from October 9-14, 1989, placing "another almost impossible burden on Plaintiff Tribe." (Filing 401, p. 3).

In response to the court's October 5, 1989, order, plaintiff petitioned Judge McManus to recuse himself from further participation in this case. (Filing 417). It argued that Judge McManus had repeatedly and unjustly denied the Tribe its day in court, and that he was guilty of gross improprieties, in that 1) he had an unvarying support for the defendants, including their attorneys who had practiced fraud upon the Tribe, and 2) he had refused to protect the Tribe from being bound by the forced, fraudulent representation by the attorneys in the Department of Justice. Plaintiff asked that all sanctions be suspended pending a full hearing and that trial proceed before an unbiased judge who will ensure a fair retrial. Judge McManus did subsequently recuse himself, but on grounds unrelated to any of the allegations contained in the plaintiff's petition.

On January 16, 1990, the magistrate denied plaintiff's motion to file the proposed pretrial order. (Filing 458). His order states: "The latest proposed final pre-trial order submitted by the plaintiff does not comply with previous orders directing its preparation. . . The proposed final pre-trial order does not comply with court orders and does not reflect the status of this litigation. This motion is denied." (Filing 458, p. 1-2).

DISCUSSION

The defendants now ask for sanctions due to plaintiff's failure to file an acceptable proposed pretrial order as required by the court's order of September 29, 1989. The plaintiff presents a number of arguments in opposition to

the defendants' motions. One of its arguments against dismissal is that the defendant State of Iowa is acting in total disregard of professional constraints and is seeking to mislead me into disposing of the case, which would result in the defendants obtaining their desired outcome of avoiding the exposure of their fraud, their lack of title, and their inability to properly defend their claims in open court. (Filing 472, p. 28-29). I see nothing to support that argument; I must find it to be without merit.

Next, the plaintiff contends that the magistrate did not intend to dismiss the case and that the magistrate did not have the authority to dismiss the case. What the magistrate intended is of no consequence. He did not dismiss the case, and his January 16, 1989, order does not purport to dismiss it. Instead, he found that the plaintiff's proposed pretrial order did not conform to court requirements. This was within his authority. I will treat the magistrate's findings as a proposed finding of fact. Pursuant to Fed. R. Civ. P. 72(b) "[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition *to which specific written objection has been made in accordance with this rule.*" (Emphasis supplied).

Section 72(b) allows a party 10 days after receipt of the magistrate's recommendation to serve and file specific written objections to the proposed findings and recommendations. If no timely objection is filed, the district court need only satisfy itself that there is no error on the face of the record in order to accept the recommendation. Fed. R. Civ. P. 72(b) Notes of Advisory Committee, *Branch v. Martin*, 886 F.2d 1043 (8th Cir. 1989).

The magistrate's order was filed January 16, 1990. (Filing 458). The certificate of service attached to the order shows the mailing of copies of the order to all parties, including counsel for the plaintiff, on that same date. The

plaintiff did not file its response (Filing 472) until March 13, 1990, clearly outside the 10-day time limit for filing an objection. My determination of the issue of the propriety of the magistrate's ruling is governed by the clearly-erroneous or contrary-to-law standard, but I choose to proceed under the stricter requirements of a *de novo* review because of the critical nature of the issue.

The plaintiff has raised a variety of other issues in its response, all of which are without merit or outside the jurisdiction of this court to decide.

The plaintiff alleges that Judge McManus is guilty of four violations of judicial integrity that denied the plaintiff its right to judicial due process. First, by virtue of his January 26, 1976, order that consolidated the cases, he subjected the plaintiff Tribe to a fraudulent and constricted complaint and forced upon the plaintiff Tribe the fraudulent representation of Evan L. Hultman, United States Attorney. Second, the judge violated the plaintiff's rights by granting the defendant's motion in limine. Third, he is engaged in an ongoing effort to unjustly disburse plaintiff Tribe's \$950,000.00 that is held in the court's General Registry Fund. Fourth, he accepted a fraudulent agreement by the Department of Justice attorneys to pay certain defendants for improvements made to the land. The plaintiff charges that Judge McManus' violations of the plaintiff's right to judicial due process are attributable to his abdication to Magistrate Hodges of constitutional power vested by Article III. Further, the content and impact of his order of consolidation, framed precisely to force upon the Tribe the fraudulent constricted complaint and the fraudulent representation by Hultman, can be understood, the Tribe charges, only as undue influence being exerted upon the judge and Magistrate Jarvey.

I do not sit as an appeals court judge to review the correctness of the district court's previous decisions. These allegations will not be discussed.

In this same vein the plaintiff wishes to relitigate a variety of past orders, including 1) the order of October 5, 1989, wherein the court found the plaintiff was "unprepared, combative and failed to endeavor in good faith to satisfy the purpose of [the pretrial] conference"; 2) the order of October 5, 1989, wherein the court sustained the defendants' motions in limine (referred to by the plaintiff as a "gag order") prohibiting the plaintiff from referring to its fraudulent misrepresentation claim against 38 the U.S. Justice Department and former U.S. attorney Hultman; 3) the order of September 29, 1989, wherein the court found the plaintiff to have "violated both the letter and the spirit of FRCP 26(b) (4)"; and 4) the judge's January 12, 1990, order of recusal exempting from that order the distribution of \$950,000.00 held in the general registry fund.

As is evident, a good portion of the plaintiff's response consists of attacks on past decisions of the district court. It is not my function, nor do I have the authority, to review those past decisions. The parties are not free, by way of my appointment to this case, to relitigate all that has gone before.

Next, the plaintiff explains that he refrained from preparing a new pretrial order (after October 16, 1989) while Judge McManus was presiding because the plaintiff's motion for recusal had been pending from October 24, 1989, until January 12, 1990, when the judge recused himself. On February 12, 1990, I was designated to proceed with this trial. The plaintiff states: "Most assuredly the ultimate pre-trial order must conform to and carry out Judge Urbom's directions."

The local rules of the United States District Court for the Northern District of Iowa, Western Division remain in full force and effect. The requirements of the proposed pretrial order have not changed by virtue of my appointment.

CONCLUSION

I conclude that sanctions are warranted for the plaintiff's failure to file an adequate PPTO. The issue now is whether that sanction should be dismissal of the plaintiff's case, or some other sanction(s). Although Judge McManus' order decreed dismissal with prejudice, I think I must explore all other options because of the drastic nature of dismissal with prejudice. Other possible sanctions include disqualifying plaintiff's present counsel from further participation in this case, requiring plaintiff's counsel to associate with local counsel, prohibiting plaintiff from presenting any expert testimony in this trial other than that which is contained in the PPTO, or prohibiting plaintiff from presenting any expert testimony in this trial other than that which is contained in the PPTO, or prohibiting plaintiff from presenting any testimony regarding Tracts II and III. I intend to hold a hearing to determine the proper sanction(s). The parties will have an opportunity to argue their positions on the possible sanctions I have listed or any other that appears appropriate.

IT IS THEREFORE ORDERED that a hearing on the issue of sanctions inherent in the defendants' motions to dismiss shall be held on the 15th day of May, 1990, beginning at 10:00 a.m., in Sioux City, Iowa.

Dated May 4, 1990.

BY THE COURT

/s/ Warren K. Urbom

United States District Judge

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

**AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., et al.,**

Defendants.

**FILED
SIOUX CITY DIV. OFFICE
NORTHERN DISTRICT OF IOWA
10:10 am
MAY 7 1990
WILLIAM J. KANAK - Clerk
By: M. Hoch, Deputy**

**MEMORANDUM AND ORDER ON SANCTIONS
REGARDING PRETRIAL CONFERENCES OF
AUGUST AND SEPTEMBER 1989**

By order of October 5, 1989, (Filing 383) Judge McManus found that the plaintiff Tribe was unprepared for the preliminary conference held on August 22 and 23, 1989, and that the "Tribe's lack of preparation and failure to follow the court's standard form for pretrial orders resulted in the Tribe's submission of a wholly unacceptable

proposed final pretrial order, and a substantially futile pretrial conference on September 8, 1989." Sanctions, in the form of an award to the defendants of all reasonable fees and expenses related to their attendance at both the preliminary conference on August 22 and 23, 1989, and the pretrial conference held on September 8, 1989, were ordered by the court. The defendants were given until October 16, 1989, to submit their affidavits setting forth their reasonable fees and expenses incurred in connection with those meetings. The Tribe was given until October 19, 1989, to file a response.

Statements of fees and expenses were filed by defendants State of Iowa and Iowa Department of Natural Resources. (Filing 393); Agricultural & Industrial Investment Co., (Filing 395); Wilson Lakin, R.G.P. Inc., and Rupp, (Filing 397) and Edna Boulden Miller, et. al., (Filing 398).

On October 19, 1989, the Tribe filed a Motion for Extension of Time in Which to File a Motion for Reconsideration of the Court's Order of October 5, 1989. (Filing 410). The motion asks for an extension of time, until October 23, 1989, due to the fact that the October 5, 1989, order involved harsh and unjust sanctions against the plaintiff. Plaintiff stated that it did not receive the last of the defendants' alleged expenditures until October 7, 1989, and that plaintiff needed to separately consider the alleged costs presented by the defendants. No ruling on plaintiff's motion appears in the record. No further response by the plaintiff has been filed in opposition to the sanctions.

The defendants have recently filed applications for orders requiring the plaintiff to pay the defendants' fees and expenses pursuant to the October 5, 1989, order. (Filings 464, 465, 467 and 471). Each of these applications points out the plaintiff's failure to file any resistance to the order for sanctions.

Essentially, I shall award fees and expenses as requested, although I have reduced some of them, because it appears to me that some of the planning that was done was not altogether wasted. The September 29, 1989, order of Judge McManus, filing 370, appears to have intended that sanctions be against the Tribe rather than against counsel. Because there is some question about that, I shall order that the issue of whom the sanction should be against will be discussed at the hearing on May 15, 1990, at 10:00 a.m. in Sioux City, Iowa.

IT THEREFORE IS ORDERED that:

(1) the motion for extension of time in which to file a motion for reconsideration of the court's order of October 5, 1989, filing 40, is denied;

(2) a sanction in the form of an award to defendants of reasonable fees and expenses related to attendance at the preliminary conference on August 22 and 23, 1989, and the pretrial conference on September 8, 1989, are awarded as follows:

To the State of Iowa and Iowa Department of Natural Resources	\$ 4,764.00
To Agricultural & Industrial Investment Co.	\$ 3,188.69
To Wilson & Jackson	\$ 4,166.00
To Charles and Florence Lakin	\$ 3,286.85
To R.G.P., Inc.	\$ 3,699.45
To Donald L. Rupp	\$ 1,968.00
To Edna Boulden Miller	\$ <u>3,132.28</u>
TOTAL	\$ 24,205.27

(3) resolution of the question of whether the sanction should be against the Tribe or its counsel will be subject

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of the hearing on May 15, 1990, at 10:00 a.m. in Sioux City, Iowa.

Dated May 4, 1990.

BY THE COURT

/s/ Warren K. Urbom

United States District Court

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT CO., et al.,

Defendants.

**FILED
SIOUX CITY DIV. OFFICE
NORTHERN DISTRICT OF IOWA**

11:10 am

MAY 29 1990

WILLIAM J. KANAK - Clerk

By: M. Hoch, Deputy

ORDER ON SANCTIONS

Pursuant to the memorandum and order on sanctions regarding pretrial conferences of August and September 1989 (Filing 482):

IT IS HEREBY ORDERED that the plaintiff Omaha Tribe and plaintiff's counsel, Mr. William H. Veeder, are jointly and severally liable for a sanction in the form of an award to defendants of reasonable fees and expenses related to attendance at the preliminary conference on September 8, 1989, as follows:

To the State of Iowa and Iowa Department of Natural Resources	\$ 4,764.00
To Agricultural & Industrial Investment Co.	\$ 3,188.69
To Wilson & Jackson	\$ 4,166.00
To Charles and Florence Lakin	\$ 3,286.85
To R.G.P., Inc.	\$ 3,699.45
To Donald L. Rupp	\$ 1,968.00
To Edna Boulden Miller	\$ <u>3,132.28</u>
TOTAL	\$ 24,205.27

The total amount is to be paid to the Clerk of the United States District Court for the Northern District of Iowa, Western Division by no later than 90 days from the date of this order.

Dated May 24, 1990.

BY THE COURT

/s/ Warren K. Urbom

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

FILED
SIOUX CITY DIV. OFFICE
NORTHERN DISTRICT OF IOWA
11:10 am
MAY 29 1990
WILLIAM J. KANAK-Clerk
By: M. Hoch, Deputy

MEMORANDUM AND ORDER ON SANCTIONS
PURSUANT TO THE MAY 15, 1990, HEARING

Following the hearing in Sioux City, Iowa, on May 15, 1990, I find that I must dismiss this case with prejudice.

I do it with reluctance. The sanction is a distasteful one. So, however, is the record of past and intended future noncompliance. The course of the case has been tortuous and torturesome. It now must end.

In addition to the explanation given in my May 7, 1990, memorandum I now respond to arguments earnestly ad-

vanced by the plaintiff's counsel at the May 15, 1990, hearing.

The plaintiff argues that my May 7, 1990, memorandum and order (Filing 483) failed to consider four motions previously filed by the plaintiff. These motions are:

1. The October 24, 1989, motion to recuse Judge McManus from further participation. (Filing 417).
2. The December 5, 1989, motion entitled "Plaintiff Omaha Indian Tribe moves this court for an order (1) to set down for a hearing all of defendants' pending motions to dismiss; (2) to hear and determine on the merits the charges that plaintiff Tribe deliberately misled defendants; (3) to preclude use of depositions of plaintiff Tribe's expert witnesses; and (4) plaintiff Tribe's response to defendants' charges with memorandum in support." (Filings 449, 450).
3. The February 14, 1990, motion to recuse Judge McManus (filed in the consolidated portion of this case, that is, the first case).
4. The March 13, 1990, motion entitled "Motion to have Honorable Warren K. Urbom hear and determine issues presented here and response to defendants' motions to dismiss with prejudice. (Filing 472).

1. The October 24, 1989, motion (Filing 417).

This motion petitions Judge McManus to recuse himself from further participation in the case. Its general argument for recusal is that Judge McManus's order of October 5, 1989, (in which, among other things, the Tribe was ordered to make their experts available for depositions on or before October 13, 1989, the Tribe was ordered to pay sanctions for its conduct at the August 22-23, 1989, preliminary conference, and the defendants' motion in limine to prohibit reference to the fraud issue was granted), dem-

onstrated bias and prejudice to the Tribe which had been demonstrated since at least July 1, 1975.

The plaintiff describes events relating back to 1975 to support its contention that Judge McManus should recuse himself, the gist of which is that he forced upon the Tribe the fraudulent representation of Hultman, Flint, and another attorney from the Department of Justice, and that on April 5, 1976, he forced upon the Tribe the fraudulent complaint in the first case. (Filing 417, p. 5). The plaintiff argues that during the pendency of its appeal to the Eighth Circuit in the first case, the court forced the Tribe to continue to participate in discovery in this current case irrespective of the fact that the matter had already been tried by all parties. Because the court threatened the Tribe that failure to participate in discovery would result in a dismissal with prejudice, the Tribe "acceded to the discovery demands as harshly enforced by this court." (Filing 417, p. 8).

An example of the court's discriminatory practice against the Tribe, it alleges, is that the court totally ignored the Tribe's burden to comply with the October 16, 1989, deadline for filing the proposed pretrial order when it ordered the Tribe to make its expert witnesses available for depositions not later than October 13, 1989. Further, when plaintiff requested that it be allowed to depose defendant Iowa's witnesses before allowing the deposing of its experts, Magistrate Jarvey declared that the Tribe could not impose a condition to the deposing of the Tribe's witnesses by demanding to depose Iowa's witnesses. Magistrate Jarvey stated:

... Mr. Veeder, you, in placing such a condition on the State's participation, you are on very thin ice, and frankly for the plaintiff's sake, I think it is lucky that you guys called me for fear of what might happen had the plaintiff persisted in placing that condition on the State of Iowa's participation in the deposition.

(Filing 417, p. 12-13).

Regarding the granting of the motion in limine on the fraud issue, the Tribe states that the court acted to deny the basic constitutional rights of the plaintiff, its counsel, its expert witnesses, and members of the Omaha Indian Tribe. Moreover, the Tribe claims that the Eighth Circuit, in *Omaha Indian Tribe v. Jackson, et al.*, 854 F.2d 1089 (8th Cir. 1988); *cert. denied*, ___ U.S. ___, 109 S.Ct. 2429, (May 30, 1989), relied in error on an order of this court entered in 1985 that declared the Tribe's fraud charges to be "... clearly untimely and merit no serious attention or consideration." (Filing 417, p. 16), The Tribe claims that if the defendant Iowa thought that the Tribe's charges of fraud were without merit it would not have been overcome by the anxieties of exposure that gave rise to their motion in limine.

Regarding discovery, the plaintiff alleges that 1) it was denied its repeated requests to convene a pretrial conference to resolve the practice and procedures to be adhered to in the second trial; 2) the court waited too long to reverse the Magistrate's sanctions of June 6, 1989; 3) the Tribe was forced to join in a pretrial conference with defendants Iowa, Wilson, R.G.P. Inc., *et al.*, who were beneficiaries of the fraud practiced upon the Tribe; 4) the Tribe was fully prepared at the August 22-23, 1989, pretrial conference; 5) the plaintiff cannot be sanctioned for failing to arrive at any "true and undisputed facts" in the pretrial order when there are none; 6) the court has erroneously stated that the Tribe failed to endeavor in good faith to satisfy the purpose of the September 8, 1989, pretrial conference; and 7) the court imposed upon the plaintiff the obligation of preparing a pretrial order using a format which cannot possibly be followed in setting forth the highly complex issues of fact and law involved in this case. (Filing 417, p. 17-25).

Based on these arguments, the plaintiff prayed that 1) Judge McManus recuse himself and that a special master be appointed to hear the Tribe's charges that it has been deprived of its day in court by discriminatory practices; 2) that it be given a full and fair hearing in regard to the charges that the Tribe failed to act in good faith in formulating and presenting the pretrial order; 3) to suspend all of the sanctions imposed on the Tribe until the facts have been reviewed and adjudged by an unbiased special master; and 4) to proceed to trial before an unbiased judge who will ensure a fair retrial with a full review of the fraud practiced upon the Tribe.

In an order dated January 12, 1990, (Filing 886 in the consolidated case), Judge McManus, who was on senior status, recused himself based on the fact that the parties were unwilling to consent to move the trial to Cedar Rapids. In light of the estimated length of trial, physical circumstances, and other commitments, he was unwilling and unable to undertake trial of the case in Sioux City. He further ordered that the Tribe's recusal motion, discussed above, was mooted by this order of withdrawal.

At the May 15, 1990, hearing the plaintiff argued that, regardless of the fact that its motion had been declared moot, I should nevertheless consider the statements and allegations contained within the motion. Having done so, the motion is still moot and I will not purport to treat it otherwise.

2. December 5, 1989, motion (Filing 449) and memorandum in support (Filing 450).

The plaintiff requests a hearing to respond to the defendants' charges in their motions to dismiss that the Tribe, its counsel and its expert witnesses have deliberately and intentionally attempted to mislead the defendants by virtue of the Tribe's responses to interrogatories and

in its proposed pretrial order regarding avulsive movements.

In response to the defendants' charges that it improperly resisted discovery procedures, the plaintiff explains that the court forced discovery on it before the exhaustion of its appeal in the consolidated case. The plaintiff had appealed from the May 30, 1987, final judgment, and asserted, among other things, that the judgment was the product of the forced, fraudulent representation on the Tribe and that plaintiff was being forced to retry title to approximately 3500 acres of land outside the Barrett Meander Line. It argues that this court, in total disregard of the plaintiff's right to be heard on appeal and at the behest of the defendants, ordered the plaintiff to engage in discovery while the appeal was still pending. By forcing the plaintiff to comply with discovery processes, it says, the defendants obtained great advantages over the plaintiff by constantly threatening it with sanctions. Unless and until the U.S. Supreme Court refused to hear plaintiff's charges (which occurred on May 30, 1989), the plaintiff argues that it should not have been coerced into participation in discovery.

I do not agree that the filing of an appeal relating to the Blackbird Bend area within the Barrett survey proscribes the continuing process of discovery as to Blackbird Bend land outside the Barrett survey or to land in Monona or Omaha Mission Bends. The pendency of an appeal in the consolidated portion of this case is not a valid excuse for plaintiff's resistance to participation in discovery relating to the unconsolidated portion of this case.

The plaintiff discusses several reasons why it believes the defendants are "feigning" surprise at the revelation of the new avulsions.

The first is that the defendants were aware of extensive drilling conducted by the plaintiff which the plaintiff states was done with the objective of proving avulsive movements

of the Missouri River. As to defendant Miller, *et al.*, the plaintiff argues that Miller's counsel received a copy of a plat locating the line of drill holes and the areas to which access was requested for Elmer Clark and Charles Robinson to conduct core drilling and visual observation. Furthermore, the plaintiff says that counsel for Miller agreed to allow the plaintiff access to the defendants' land for drilling purposes, and was present during drilling. As to defendant Agricultural, the plaintiff states that counsel for Agricultural agreed to allow Dr. Robinson to enter Agricultural's property for purposes of drilling. As to defendant Iowa, the plaintiff states that Gerald Jauron, one of Iowa's experts, was present during drilling at Monona and Omaha Mission Bends. Similarly, defendants McGuire and Barton and defendant Rupp granted access to the plaintiff to conduct drilling on their land.

The fact that the defendants cooperated with the plaintiff's discovery does not equate with a finding that the defendants knew the results of the drilling. It does not support a finding that defendants should have known that the plaintiff's proposed pretrial order submitted on October 16, 1989, was incomplete, nor would it put the defendants on notice that the plaintiff's answers to Agricultural's interrogatories were incomplete. The plaintiff's argument that the defendants were aware that the plaintiff's theory of the case was that the Missouri river moved by avulsion is not sufficient to infer knowledge upon them of specific avulsive movements.

Second, the plaintiff argues that it gave all of its "basic data", including all drill logs utilized by the plaintiff in formulating and proving the avulsive movements of the Missouri River, to defendant Agricultural on July 17, 1989, who shared it with the other defendants. The further argument is that Agricultural was also provided with plaintiff's Exhibit 448, which plaintiff describes as setting forth in detail the areas in which it conducted intensive

drilling in Monona and Omaha Mission Bends in preparation for establishing avulsive movements.

The plaintiff does not specifically contend that it divulged the six avulsions discovered during depositions in its "basic data". Rather, the basic data is described as having been "utilized by Plaintiff Tribe's experts in formulating and proving its claim to title to the lands now occupied by Defendant Agricultural." (Filing 449, p. 29). There is no showing that the plaintiff shared the conclusions reached by its experts, based on this basic data, with the defendants. Similarly, Exhibit 448, in plaintiff's own words, "graphically displays all of the drilling conducted by Plaintiff Tribe *in its preparation* to establish the avulsive movements of the Missouri River, including drilling, December 1973; drilling, March, [sic] 1976; hand augering, March 1976; drilling, November 1978; drilling, April 1981; and drilling, 1986." (Emphasis supplied). (Filing 449, p. 20). I also note that in the plaintiff's proposed pretrial order it describes the purpose of Exhibit 448 as being "To show with specificity the exact locations of holes drilled in Monona Bend area to determine materials at depth which support the Omaha Tribe's claim that the land is accretions to the right bank of the Missouri River." (Tracts II and III, p. 129). This is not sufficient to alert the defendants to specific avulsions claimed by the plaintiff.

Furthermore, defendant Agricultural states in its response to this filing that Agricultural did at one time have the drilling logs, but that plaintiff's counsel and Robinson insisted they be returned, which they were. On November 8, 1989, counsel for Agricultural sought by telephone to require the plaintiff to again furnish the drilling logs and drilling analysis so that Agricultural could make sense of the plaintiff's new "geological exhibits". Agricultural contends that the plaintiff did not produce certain "geological exhibits" when the drill logs were previously provided. Agricultural states that plaintiff's counsel agreed to make the drill logs and drilling analysis available if Agricultural

agreed to pay \$150.00 for the copies, which it did. On November 20, 1989, counsel for Agricultural sent a letter to plaintiff's counsel stating that a check was enclosed and that the drilling logs had not yet been received. Plaintiff's counsel responded on December 6, 1989, that he was returning the \$150.00 check, and that it was his understanding that Dr. Robinson was also requiring payment for the costs of the time and reproduction for the resubmittal of the well logs. Counsel for Agricultural replied on December 13, 1989, that he wanted a confirmation on whether or not the drill logs would be sent so that he could seek appropriate judicial relief if necessary. Agricultural states that as of the date of its response, (December 28, 1989) the drilling logs and drilling analysis have not been received nor has plaintiff's counsel responded to the December 13, 1989, letter. At the hearing conducted May 15, 1990, counsel for Agricultural said it still had not received any drilling logs.

Third, the plaintiff argues that its experts fully explained their positions during their depositions in late October 1989. For instance, at the October 24, 1989, deposition, Dr. Robinson explained in detail the drilling areas and cross-sections of channel that demonstrated the avulsive character of the river movements. Likewise, during Elmer Clark's deposition, Clark utilized the plaintiff's exhibits and the basic data that had been submitted on July 17, 1989, to explain the movements in Monona Bend. In sum, the plaintiff asserts that the defendants were present during nine days of depositions and had an opportunity to interrogate the plaintiff's witnesses in depth and had ~~and~~ of the plaintiff's exhibits to use at the depositions.

The premise of this argument seems to be that the plaintiff could not have failed to disclose any information because the defendants found out about it anyway. This overlooks the entire reason the motions to dismiss were filed by the defendants: to protest the fact that the avulsions had not been disclosed to them prior to the depo-

sitions as they should have been. The plaintiff's argument in this regard is without merit.

Fourth, the plaintiff states that it is experiencing shock to hear Iowa's assertion that six new avulsions were discovered during depositions. It contends that it does not have any idea to what they are referring and wishes the defendants would tell it what they are talking about. I have previously set out the six avulsions in my memorandum and order of May 7, 1990, (Filing 483) and will not restate them. I do note that on pages 51 and 52 of this motion the plaintiff describes three of the six avulsions of which it purports to have no knowledge.

Finally, the plaintiff asserts that even assuming that the defendants were not fully aware of the claimed avulsions, they cannot argue that they were surprised or prejudiced because the original November 6, 1989, trial date was continued, and they've now had sufficient time to prepare. The plaintiff overlooks the fact that the delay was due in part to its own actions. The plaintiff will not be allowed to benefit from its own concealment. The history of this case shows that the plaintiff's failure to disclose in a timely manner the anticipated testimony of its experts is not an isolated incident of simple inadvertence. Rather it is only one incident in a series of many that demonstrate the plaintiff's unwillingness to abide by the orders of this court.

In its memorandum in support of the motion (Filing 450), the plaintiff cites *Outley v. City of New York*, 837 F.2d 587 (2nd Cir. 1988). The Second Circuit ruled that the district court had erred in precluding the testimony of two of the plaintiff's eyewitnesses as a sanction for inadvertent failure to supplement its previous interrogatory response regarding the addresses and telephone numbers of the witnesses. It noted that there was no suggestion in the record that the failure of plaintiff's counsel was anything but a good-faith oversight of an inexperienced practitioner. Furthermore, defendants would not be greatly

prejudiced by their testimony because it would not be technical or specialized evidence of an expert, but rather the simple observation of a single incident. There had been no other continuances in the trial.

I find that *Outley* is highly distinguishable from the facts in the present case. An isolated good faith inadvertence is a far cry from a proper description of the behavior of the plaintiff and its counsel here.

The plaintiff also cites *Edgar v. Slaughter*, 548 F.2d 770 (8th Cir. 1977) wherein the court reiterated that the harsh remedies of dismissal and default should be used only when the failure to comply is due to willfulness, bad faith or any fault of the plaintiff. The court goes on to admonish that:

Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney fees or even an attorney's citation for contempt would be a more just and effective sanction. 548 F.2d 773.

As the record shows, I have already held such a hearing on May 15, 1990, the purpose of which was to explore all other options because of the drastic nature of dismissal with prejudice. The parties were given an opportunity to argue their positions on the sanctions each felt would be appropriate. The defendants were unanimous in their opposition to any sanction other than dismissal. The plaintiff suggested no sanction; it simply opposed any sanction.

It is true that further delay would result if I disqualified plaintiff's counsel from further participation in this case. His removal would cause this matter to be continued for an indefinite period of time while the Tribe attempted to obtain new counsel, and if new counsel were obtained, for that person to prepare adequately this highly technical and

factually complex case. As counsel for Edna Boulden Miller *et al.* pointed out, many of his clients are elderly and cannot afford further time delay. An order disqualifying the plaintiff's counsel would be more of a punishment to the defendants than it would be to the plaintiff.

The possibility of requiring the plaintiff's counsel to associate with local counsel is no longer an option. I was informed at the May 15, 1990, hearing that the plaintiff's counsel began an association with local counsel sometime around 1975, which lasted until fairly recently. The record is clear that having local counsel has not and is not going to remedy the problems that continue to recur.

A third option was to limit the plaintiff to that expert testimony that was contained in the October 16, 1990, proposed pretrial order. I reject that as an option, because I do not think it would be possible to limit the opinions of the experts, due to the general wording in the proposed pretrial order. For instance, the plaintiff stated that Elmer Clark "will testify with precision and exactitude as to the various locations of the Missouri River from two years prior to the Omaha Indian Treaty of 1854 to date." Statements such as this are so general that to limit the plaintiff to the proposed pretrial order is not to place any limits at all.

Limiting the plaintiff's experts to testimony given by them at the trial of the consolidated cases would be tantamount to a dismissal with prejudice. It would accomplish no appropriate purpose. Furthermore, not all of the defendants here were participants in the consolidated portion of the case.

Previous sanctions have failed to ensure compliance with the orders of this court. Monetary sanctions have not been successful in inducing compliance. The plaintiff and its counsel have only recently satisfied their obligations to pay monetary sanctions as ordered by the court in the consolidated case in 1987. On May 10, 1990, the plaintiff paid

\$44,865.53 to the clerk of the court. On the same date plaintiff's counsel paid \$3,309.70. These amounts are reflected in Judge McManus' order that is attached to my May 7, 1990, memorandum. The plaintiff and its counsel are now also jointly liable for sanctions in the amount of \$24,205.27 for their lack of preparedness at the preliminary pretrial conference held on August 22-23, 1989. Counsel for plaintiff declared at the May 15, 1990, hearing that he had no intention of paying any of the \$24,205.27 because of the fraud practiced on the Tribe, and that he is willing to go to jail instead.

The plaintiff was twice held in contempt in the consolidated portion of this case. On one occasion the plaintiff was held in contempt for refusing to obey the court's order to cease interfering with the defendants' use and occupancy of the non-trust lands within Blackbird Bend, and was ordered to pay compensatory damages for willfully cutting forty-six trees on the land. On another occasion the Tribe was held in contempt and tribal members were incarcerated due to their contemptuous conduct. The incarcerated members were released from jail on May 1, 1987, and were absolved from paying the daily \$10,000.00 fine upon its agreement to comply with court's orders. To now hold plaintiff's counsel in contempt would serve no other purpose than to further delay this case.

Dismissal with prejudice is a harsh sanction which should be imposed only after balancing the policy of giving the plaintiff her day in court against the policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures." *Garrison v. International Paper Co.*, 714 F.2d 757 (8th Cir. 1983).

In *Welsch v. Automatic Poultry Feeder Co.*, 439 F.2d 95 (8th Cir. 1971), the appellants claimed that the district court had improperly dismissed their case because their actions had not been willful. The Eighth Circuit held that a willful failure to comply with a court order or failure

to prosecute implies a conscious or intentional failure to act, as opposed to accidental or involuntary noncompliance. I cannot characterize the plaintiff's actions as accidental or involuntary. They have been conscious and intentional.

The plaintiff's failure to file an acceptable proposed pre-trial order, which includes its failure to reveal adequately the testimony of its expert witnesses, is evidence of a systematic pattern of failure to comply with court rules and court orders. Court proceedings have repeatedly been delayed by the plaintiff's failure to sufficiently comply with discovery orders. Having balanced the consequences of denying the plaintiff its day in court with the countervailing interests in preserving respect for this court and preventing undue delay, I find no option but to dismiss the plaintiff's case with prejudice.

As I mentioned previously, the plaintiff's December 5, 1989, motion contains a request for a hearing to answer the charges made against it by the defendant. I find that the plaintiff has already had an adequate opportunity to do so by way of its motions and the May 15, 1990, hearing. To have another hearing at this point would serve no purpose. Therefore I will deny the plaintiff's request for a further hearing.

3. The February 14, 1990, motion.

The plaintiff has asked that I review its February 14, 1990, motion. The record in the present (unconsolidated) case does not show a filing by the plaintiff on or about February 14, 1990. However the plaintiff did file a motion on February 14, 1990, (Filing 897) in the consolidated case, which asked for the recusal of Judge McManus. That motion has previously been ruled on and denied by Judge McManus. (Filing 906).

4. The March 13, 1990, motion (Filing 472).

Finally, the plaintiff requested that I consider its March 13, 1990, motion. I have previously considered this motion

and discussed it in my memorandum and order of May 7, 1990, (Filing 483). Having already done so, I see no need to discuss it a second time. Counsel for the plaintiff correctly pointed out at the May 15, 1990, hearing that an error had been made on page 9 of the May 7, 1990, memorandum. The final paragraph of page 9 contains a sentence which states, in part: "First, by virtue of date of January 26, 1976, should be changed to April 15, 1976. This was an inadvertent error and I apologize for any confusion. My decision in the memorandum and order is not affected by the change of date.

On May 14, 1990, the plaintiff filed a motion to be heard respecting the memorandum and orders entered May 7, 1990, antecedent to disposition. This motion generally mirrors the arguments made by the plaintiff at the May 15, 1990, hearing; that is, that I should consider the December 5, 1989, motion prior to any decision to dismiss this matter. I have done so.

The plaintiff contends that I erred in finding, in the May 7, 1990, order (Filing 483), that the plaintiff had failed to make any good faith attempt to arrive at any undisputed facts. The plaintiff points out that, contrary to my statements in the memorandum, plaintiff did agree at the time of the pretrial conference that the Omaha Indian Tribe is incorporated and that Iowa is a state in the Union.

The plaintiff may well have made such agreement at the pretrial conference, but it did not choose to agree to those statements in the proposed pretrial order. It is in a pretrial order that the parties are expected to reflect the fruits of a reasonable, good faith attempt to arrive at uncontroverted facts. If the plaintiff made such an attempt at the pretrial conference by an agreement to two tiny facts, it was withdrawn by tendering the proposed pretrial order shorn of the agreement.

Next, the plaintiff argues that the judicial integrity of this court has again been violated because I constricted

the period of time allowed to the plaintiff to consider the May 7, 1990, memorandum and order, and forced a hearing respecting those issues on May 15, 1990, all in an attempt to render it impossible for the plaintiff to have a full and fair hearing on that date. I note only that plaintiff's counsel along with defendants' counsel, was consulted prior to the setting of that date, and all counsel, including plaintiff's counsel, were agreeable to the May 15, 1990, date.

IT IS THEREFORE ORDERED that:

1. the plaintiff's motion for a hearing, filing 449, filed on December 5, 1989, to address the defendants' charges that plaintiff deliberately misled them is denied;
2. the plaintiff's motion to be heard respecting the memorandum and orders entered May 7, 1990, filing 486, has been complied with and is therefor moot; and
3. the defendants motions to dismiss with prejudice, Filings 460, 462, 463, 465, 468, 469, and 470, are granted.

Dated May 24, 1990.

BY THE COURT

/s/ Warren K. Urbom
United States District Court

APPENDIX F

UNITED STATES COURT OF APPEALS,
EIGHTH CIRCUIT.

 No. 90-2133.

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH THE UNITED STATES (10 Stat. 1043), Organized pursuant to the Act of June 18, 1934 (48 Stat. 984; 25 U.S.C. 476) as amended,

Appellant,

v.

TRACT I—BLACKBIRD BEND AREA: Agricultural and Industrial Investment Company; American Telephone & Telegraph Company; Edith Benjamin; Herbert Nelson Benjamin; Maurice Louis Benjamin; James Brooks Benson; Helen Bentley; George R. Boulden; Matilda Boulden; Vasco Bouldeneo Cox; John K. Craford; M. George Craford; Ruth Craford; Phyllis Dale; Gladys Durr; Lloyd Fletcher; Frank Carlton Follett; Great Lakes Pipeline Company; Alma Schmidt Henderson; Iowa Public Services Company; Harold Jackson; Letha Jenkins; Rose Ann Kane; Bertha Kirk; Harriet Kirk; Mary Ann Kiskadon; Charles E. Lakin; Florence Lakin; Albert J. Larson; John H. Lund; Ruth J. Lund; Magnolia Pipeline Company; Ethel McCoy; Mid-American Pipeline Company; Mid-Continent Eastern Pipeline Corporation; Monona County Rural Electric Cooperative; Northern Natural Gas Company; Arthur Orr; Robert Orr; Otis Peterson; R.G.P. Incorporated, an Iowa Corporation; Anena Ruth; George C. Ruth; Richard A. Ruth; Jean M. Ruth; Fred Sanders; Fred E. Sanders; Rosalie Sanders; Socony Vacuum Oil Company; Darrell L. Sorenson; Harold Sorenson; Harold M. Sorenson; Luea Sorenson; Fred Stangel; State of Iowa, State of Iowa Conservation Commis-

sion; Edward L. Torticilli; Mary A. Torticilli; Regina Marie Torticilli; Travelers Insurance Company; Ariel Virtue; W.W. Virtue; Willaday Farms, Inc.; Ross O. Willey; Vincent R. Willey; Williams Brothers Pipeline Company; Roy Tibbals Wilson,

Appellees,

Tract II—Monona Bend Area: Agricultural & Industrial Investment Company; Karen Anderson; Richard L. Anderson; Eva Carlson; Harold Carlson; Mildred Orr Carter; Hazel Clark; Kenneth Clark; Chris Christensen; Barbara Dahl; Clara Grace Dahl; Gordon Dahl; Doris Dufrene; Harold B. Dufrene; Myrva Everett; R.J. Everett; Lloyd P. Fender; Verna Pearl Fender; Gertrude Gibler; Alma Schmidt Henderson; J.B. Hicks; Substitute Trustee for Mildred C. Hicks; Maude B. Hudgel; Ramona Orr Huff; Henry L. Jester; James Kent; Sue Kent; Carroll Koenig; Lorraine Kutzler; Emma Johanna Olson; Alice Parker; Nadine Parker; Wallace G. Parker; L.S. Raines; Carol Ann Reitan; Robert E. Reitan; Donald L. Rup; Lillian C. Rup; Roy R. Rupp; Don E. Ruth; Joyce M. Ruth; Don E. & Joyce M. Ruth (Commercial); Edna J. Sporder; Lillie Mae Stevens; Roy T. Sorenson; Wilbur L. Stokely; Dan K.

Weaver,

Appellees,

Tract III—Omaha Mission Bend Area: Emily S. Blair; Donna C. Ford; Frances Goodman; Ray L. Grosvenor; Iowa Public Service Company; Iowa State Conservation Commission; Hazel I. Jacobson; Joan S. Jacobson; William S. Jacobson; Minnie Marble; Coy W. McFarland; Maude E. McFarland; Ruby McFarland; Fred E. Nelson; Gladys E. Nelson; Lloyd E. Nelson; Carolyn Ann Nelson; Larry L. Nelson; Ernest L. Olson; Bernard M. Olson; Larry M. Olson; Leland M. Olson; Harold Queen; John M. Ropes; Clyde H. Rush; Glen Swan; Grace Swan; Ethel Swan; P.C.

Swan; Harry D. Taylor; Majayne Ropes Weber,

Appellees.

Submitted Jan. 7, 1991.

Decided May 28, 1991.

Indian Tribe brought quiet title action. The United States District Court for the Northern District of Iowa, Edward J. McManus and Warren K. Urbom, JJ., dismissed action with prejudice, and Tribe appealed. The Court of Appeals held that: (1) Court of Appeals' earlier ruling on Tribe's fraud claim was law of case; (2) dismissal with prejudice was proper; and (3) Tribe was liable for double costs of appeal.

Affirmed.

William Veeder, Washington, D.C., for appellant.

Wiley Mayne, Sioux City, Iowa, and Peter Peters, Council Bluffs, Iowa, for appellees.

Before LAY, Chief Judge, and MAGILL and LOKEN, Circuit Judges.

PER CURIAM.

The Omaha Indian Tribe ("Tribe") appeals from the district court's¹ order, issued as a sanction pursuant to Federal Rules of Civil Procedure 16(f) and 41(b), granting the defendants' motions to dismiss with prejudice the Tribe's action to quiet title to lands located in Monona Bend, Omaha Mission Bend, and Blackbird Bend outside the Barrett Survey. On appeal, the Tribe argues that it was denied due process. We affirm the judgment of the district court.

¹ The Honorable Warren K. Urbom, United States District Judge for the District of Nebraska.

I.

In 1854, the Tribe and the United States entered into a treaty which reserved for the Tribe certain lands located west of the "centre of the main channel of said Missouri river." Act of March 16, 1854, Art. 1, 10 Stat. 1043. The treaty established the Missouri River as the eastern boundary of the Tribe's reservation. After 1854, the Missouri River moved in such a way as to cause the boundary of the reservation to move eastward to the Iowa high bank.

In 1975, the United States, as trustee for the Tribe, brought suit to quiet title to land lying adjacent to the Missouri River in an area called Blackbird Bend in Monona County, Iowa. The United States alleged that the land had been part of the Tribe's original reservation on the Nebraska side of the Missouri River before the river changed course. The United States claimed approximately 2900 acres of land lying inside the Barrett Survey in Blackbird Bend. The Tribe subsequently filed two additional lawsuits to quiet title to land situated in Monona County. Specifically, the Tribe claimed land in the Blackbird Bend Area, the Monona Bend Area, and the Omaha Mission Bend Area. The lands located inside the Barrett Survey Area in Blackbird Bend were originally part of the Omaha Indian Reservation; however, the lands located in Monona Bend, Omaha Mission Bend and Blackbird Bend outside the Barrett Survey Area were not part of the Tribe's original reservation.

The three lawsuits were consolidated for trial in 1976. The trial court later severed the Tribe's claims to lands located outside the Barrett Survey Area in the interests of judicial convenience and economy. The action to quiet title to lands located in Blackbird Bend inside the Barrett Survey is referred to as the consolidated case; the unconsolidated case involves the Tribe's claims to lands lying outside the Barrett Survey. In 1979, the court stayed further proceedings in the unconsolidated case pending the

outcome in the consolidated case. Litigation in the consolidated case, hopefully, has come to rest.²

On June 15, 1987, the trial court reactivated the unconsolidated case. This appeal concerns approximately 8000 acres of land situated in Monona Bend, Omaha Mission Bend and Blackbird Bend outside the Barrett Survey Area. The defendants are owners of land in Monona County, Iowa. The United States is not a party in the present action. The land involved in the immediate case was not part of the original reservation. The Tribe's claim, therefore, is an action at law for ejectment rather than an equitable title proceeding. See *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089, 1096 n. 6 (8th Cir.1988). The Tribe's general theory is that its reservation was enlarged when the Missouri River moved away from the reservation and towards the Iowa bank by erosion and accretion. The Tribe claims, however, that the river then moved west back towards Nebraska by avulsion, leaving reservation land on the Iowa side of the river.

The facts and circumstances which lead up to the dismissal of the Tribe's case with prejudice are extraordinary. Counsel for the defendants residing in Monona Bend and Omaha Mission Bend submitted interrogatories to the Tribe requesting the names of their experts and the facts known and opinions held by them in accordance with Rule 26(b)(4)

² *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977); *Omaha Indian Tribe v. Wilson*, 575 F.2d 620 (8th Cir. 1978), *vacated and remanded*, 442 U.S. 653, 99 S.Ct. 2529, 61 L.Ed.2d 153 (1979); *Omaha Indian Tribe, Treaty of 1854 with the United States v. Wilson*, 614 F.2d 1153 (8th Cir.), *cert. denied*, 449 U.S. 825, 101 S.Ct. 87, 66 L.Ed.2d 28 (1980); *United States v. Wilson*, 523 F.Supp. 874 (N.D.Iowa 1981); *United States v. Wilson*, 707 F.2d 304 (8th Cir. 1982), *cert. denied*, 465 U.S. 1025, 104 S.Ct. 1281, 79 L.Ed.2d 684 (1984); *United States v. Wilson*, 578 F.Supp. 1191 (N.D.Iowa 1984), *aff'd in part and rev'd in part*, *Omaha Indian Tribe v. Jackson*, 854 F.2d 1089 (8th Cir. 1988), *cert denied*, 490 U.S. 1090, 109 S.Ct. 2429, 104 L.Ed.2d 986 (1989); *United States v. Wilson*, 926 F.2d 725 (8th Cir. 1991).

of the Federal Rules of Civil Procedure. When the Tribe failed to respond, the defendants filed motions to compel discovery. The defendants also served a request for production of documents on the Tribe. On January 26, 1989, United States Magistrate John A. Jarvey granted the defendants' motions to compel discovery and ordered the Tribe to answer the interrogatories and comply with the request for production of documents by August 1, 1989. Magistrate Jarvey further ordered the Tribe to designate its witnesses by April 1, 1989. The Tribe subsequently filed a motion for reconsideration of the January 26, 1989 order and requested the court to stay all proceedings. On June 6, 1989, after learning that the Tribe had failed to designate its experts, Magistrate Jarvey sanctioned the Tribe by limiting it to the expert opinions given at the first trial in the consolidated case.

The case was set for trial on November 6, 1989. On August 18, 1989, Magistrate Jarvey ordered the parties to submit a proposed final pretrial order to him by September 1, 1989, and scheduled a final pretrial conference for September 8, 1989. The parties met in Sioux City, Iowa on August 22 and 23, 1989, to prepare a final pretrial order. On September 13, 1989, five days after the final pretrial conference was held, Magistrate Jarvey ordered the Tribe to submit a revised proposed final pretrial order to him by September 25, 1989. Magistrate Jarvey stated in his order:

"the court . . . was unable to accomplish virtually any of the objectives of a final pre-trial conference due to [the Tribe's] . . . complete failure to provide an acceptable proposed final pre-trial order. . . . Instead of providing one cohesive integrated document, counsel for . . . [the Tribe] simply gathered the proposals of the parties and stapled them together. The parties were even unable to stipulate that the Tribal Council is the governing body for the . . . [Tribe]."

Magistrate's Order at 1-2 (Sept. 13, 1989). He then ordered the parties to "make a good faith attempt to narrow the issues to those truly in dispute." *Id.*

On September 20, 1989, the Tribe filed a motion to reconsider the magistrate's orders dated June 6 and September 13, 1989. On September 29, 1989, Judge Edward J. McManus issued an order granting the Tribe's motion with respect to the designation of its experts. Although Judge McManus agreed with Magistrate Jarvey that the Tribe's designation of witnesses and answers to interrogatories failed to "provide . . . any meaningful statement of opinions and facts on which the experts are expected to testify, and . . . [to include] a summary of the grounds for each opinion," he concluded that "the defendants are familiar enough with this litigation that they will not be severely prejudiced if the Tribe's experts are permitted to testify." District Court's Order at 3 (Sept. 29, 1989). Judge McManus also stated in his order that "[t]he Tribe's dismal history of noncompliance with the orders of this court is well documented. The Tribe's failure to submit the revised proposed final pre-trial order on time is yet another example of its noncompliance." *Id.* at 4. Judge McManus then stated that the Tribe's case would be dismissed with prejudice unless the Tribe delivered to the magistrate by October 16, 1989 a revised proposed pretrial order in the form required by the court.

Throughout the course of this litigation the Tribe has continued to allege that the Department of Justice attorneys participated in fraud and collusion in their representation of the United States as trustee for the Tribe by limiting the Tribe's claims in the consolidated case to lands inside the Barrett Survey. Counsel for the Tribe continues to argue fraud notwithstanding this court's previous holdings that the Tribe's fraud argument is without merit. *Omaha Indian Tribe v. Jackson*, 854 F.2d at 1092 n. 4; *In re Omaha Indian Tribe*, No. 86-1717 (8th Cir.

July 18, 1986) (order denying petition for writ of mandamus).

After the parties met in Sioux City, Iowa to prepare a final pretrial order, the defendants filed motions for sanctions. On October 5, 1989, Judge McManus granted the defendants' motions for sanctions and ordered the Tribe to pay all the reasonable fees and expenses related to the defendants' attendants at both the preliminary conference on August 22 and 23, 1989, and the hearing on September 8, 1989. Judge McManus stated that "the Tribe was unprepared, combative, and failed to endeavor in good faith to satisfy the purpose of . . . [the preliminary] conference or the final pretrial conference held . . . on September 8, 1989." District Court's Order at 3 (Oct. 5, 1989). To demonstrate the Tribe's lack of good faith at the pretrial conference, Judge McManus noted that counsel for the Tribe, William Veeder, responded to a defendant's inquiry concerning the Tribe's failure to bring a proposed statement of undisputed facts to the conference as follows: "I never agreed on anything in 13 years. We'll just go ahead that way." *Id.* Judge McManus concluded that "[t]he Tribe's lack of preparation and failure to follow the court's standard form for pretrial orders resulted in the Tribe's submission of a wholly unacceptable proposed final pretrial order, and a substantially futile pretrial conference on September 8, 1989." *Id.* Judge McManus also ordered the Tribe to refrain from referring to the fraud argument. Pursuant to Judge McManus' order dated September 29, 1989, the Tribe delivered its proposed pretrial order to the magistrate and filed a motion to file its pretrial order on October 16, 1989.

Late in the discovery process, the defendants deposed the Tribe's expert witnesses with respect to the lands located in Monona Bend and Omaha Mission Bend and learned that the Tribe had failed to disclose certain avulsions in its answers to interrogatories and its proposed pretrial order. The defendants then moved to dismiss the

plaintiff's case. On December 5, 1989, the Tribe filed a motion for a hearing to address the defendants' charges that the Tribe deliberately misled them.

On January 12, 1990, Judge McManus recused himself from the case on the grounds that physical circumstances and other commitments prevented him from undertaking an extended trial in Sioux City, Iowa. Judge Warren K. Urbom from the District of Nebraska was subsequently appointed to the case.

On January 16, 1990, Magistrate Jarvey denied the Tribe's motion to file the final pretrial order because it did not "comply with previous [court] orders directing its preparation" and did not "reflect the status of this litigation." Magistrate's Order at 1- 2 (Jan. 16, 1990). After Judge Urbom reviewed the record de novo, he concluded in his memorandum and order dated May 7, 1990, that the Tribe failed to file an adequate proposed pretrial order. He specifically found that the Tribe had failed to make a good faith effort to arrive at any undisputed facts; that the Tribe's statement of legal issues was inadequate because it raised the frivolous fraud issue and improperly alleged that the Tribe was being forced to relitigate issues previously decided in the consolidated case; and that the Tribe had failed to disclose six alleged avulsions. Judge Urbom concluded that the Tribe should be sanctioned for failing to file an adequate proposed pretrial order and scheduled a hearing on the issue of sanctions for May 15, 1990.

On May 29, 1990, two weeks after the hearing was held on the sanctions issue, Judge Urbom granted the defendants' motions to dismiss the Tribe's suit with prejudice. Judge Urbom found the Tribe's noncompliance with court orders and rules intentional and conscious. He stated:

The plaintiff's failure to file an acceptable proposed pretrial order, which includes its failure to reveal adequately the testimony of its expert witnesses, is evidence

of a systematic pattern of failure to comply with court rules and court orders. Court proceedings have repeatedly been delayed by the plaintiff's failure to sufficiently comply with discovery orders. Having balanced the consequences of denying the plaintiff its day in court with the countervailing interests in preserving respect for this court and preventing undue delay, I find no option but to dismiss the plaintiff's case with prejudice.

District Court's Memorandum and Order at x (May 29, 1990). Judge Urbom also denied the Tribe's motion for a hearing concerning the defendants' charges that the Tribe deliberately misled them. Judge Urbom reasoned that the Tribe already had an adequate opportunity to address those charges by motion and at the hearing on the issue of sanctions.

Judge Urbom also considered other possible sanctions including holding the Tribe's counsel, William Veeder, in contempt, assessing monetary sanctions against the Tribe, disqualifying the Tribe's counsel from further participation in the case, requiring the Tribe's counsel to associate with local counsel, limiting the Tribe's counsel to the expert testimony that was contained in the proposed pretrial order, and limiting the Tribe's counsel to the expert testimony given in the consolidated case. He concluded, however, that no sanction other than dismissal could remedy the Tribe's record of "past and intended future non-compliance" with court orders. *Id.* at ii.

On June 8, 1990, the Tribe filed a motion for reconsideration of the district court's order of dismissal. The Tribe's motion was denied on June 14, 1990. The Tribe filed a notice of appeal on July 11, 1990.³

³ The defendants argue that the Tribe's appeal should be summarily dismissed because the Tribe failed to file its notice of appeal within thirty days after the date of the entry of judgment (May 29, 1990), as required by Rule 4(a) of the Federal Rules of Civil Procedure. They

II.

A. Law of the Case

In its brief on appeal, the Tribe argues that the Department of Justice attorneys who represented the United States as trustee for the Tribe participated in fraud by limiting the Tribe's claims in the earlier action to land inside the Barrett Survey in Blackbird Bend. The Tribe also contends that Judge McManus "fully supported" and "effectuated" the fraud practiced on the Tribe by "forcing upon . . . [the] Tribe the rejected representation" of the Department of Justice attorneys. Appellant's Brief at iv, 8. The Tribe further argues that the Tribe was denied "its Constitutional right of due process to initiate its own law suit and to prosecute that law suit" as a result of Judge McManus's alleged judicial misconduct. *Id.* at v. The Tribe also alleges that Judge Urbom became a "participant in the judicial cover-up of the fraud" by refusing to address the charges against Judge McManus. *Id.* at 24-25. The Tribe contends that Judge Urbom "adopt[ed] Judge McManus[]" violations of judicial integrity and embrac[ed] the false and perverted charges made by the . . . [defendants] and Judge McManus against . . . [the] Tribe." *Id.* at 25. The Tribe further alleges that Judge Urbom's "bias and prejudice against . . . [the] Tribe" surfaced in his May 29, 1990 order. *Id.* at 34. The Tribe concludes that "[t]he bias, prejudice, and aggressive partiality for

claim that the Federal Rules of Civil Procedure do not recognize a motion for reconsideration. We disagree.

Courts generally view any motion which seeks a substantive change in the judgment as a Rule 59(e) motion if it is made within ten days of the entry of judgment. 6A J. Moore, *Moore's Federal practice* ¶ 59.12[1] (2d ed. 1989). A motion to reconsider has been construed as a Rule 59(e) motion. See *Wild v. St. Paul Cos., Inc.*, 612 F.2d 341 (8th Cir. 1979); *Seshachalam v. Creighton Univ. School of Medicine*, 545 F.2d 1147 (8th Cir. 1976), *cert. denied*, 433 U.S. 909, 97 S.Ct. 2974, 53 L.Ed.2d 1093 (1977). The Tribe's motion to reconsider is the functional equivalent of a motion to alter or amend the judgment.

the . . . [defendants] by Judge Urborn and Judge McManus in accepting . . . [the defendants'] charges against . . . [the] Tribe . . . while completely denying . . . [the] Tribe the right to be heard and [the right] to refute those charges . . . is the very essence of denial of Due Process." Appellant's Reply Brief at 20.

In *Omaha Indian Tribe v. Jackson*, 854 F.2d at 1092 n. 4, we held that the Tribe's claim that the Department of Justice attorneys participated in fraud was without merit. Moreover, when the Tribe petitioned this court for a writ of mandamus alleging fraud, we dismissed the Tribe's petition as "frivolous and totally without merit" and sanctioned the Tribe's counsel by awarding the United States costs and attorney's fees. *In re Omaha Indian Tribe*, No. 86-1717 (8th Cir. July 18, 1986) (order denying petition for writ of mandamus). This court has ruled on the Tribe's fraud claim and our prior decisions now stand as the law of the case. See *Little Earth of the United Tribes, Inc. v. United States Dep't of Hous. & Urban Dev.*, 807 F.2d 1433, 1440-41 (8th Cir. 1986) (finding law of the case doctrine prevents relitigation of settled issues).⁴

B. Dismissal with Prejudice

The Tribe argues that Judge Urborn abused his discretion by dismissing the case with prejudice. We disagree.

The district court has authority to dismiss an action with prejudice for failure to comply with court orders or the

⁴ The Tribe also urges this court to set aside the district court's post-judgment orders requiring the United States to satisfy its liability for improvements out of an escrow account which contains crop proceeds from land situated within the Barrett Survey. Because the district court's post-judgment orders simply conform to our holding in *Jackson*, 854 F.2d at 1094-95, we find the Tribe's argument meritless. We also find the Tribe has no legal interest in the division of the court registry fund between the United States and the private defendants. This court specifically held in *Jackson* that the government's liability to reimburse the private defendants for the improvements on the land should be satisfied out of escrowed trust funds in the court registry fund. *Id.*

Federal Rules of Civil Procedure. Fed.R.Civ.P. 41(b). Rules 16(f) and 37(b) also permit dismissal as a sanction for failure to obey the court's orders. Dismissal with prejudice should be used sparingly because it is a drastic sanction. *Welsh v. Automatic Poultry Feeder Co.*, 439 F.2d 95, 96 (8th Cir.1971). We review a district court's decision to dismiss under the abuse of discretion standard. *Garrison v. International Paper Co*, 714 F.2d 757, 760 (8th Cir.1983). An action should be dismissed with prejudice "only after balancing the policy of giving the plaintiff her day in court against [the] policies of preventing undue delay, avoiding court congestion, and preserving respect for court procedures." *Id.*; see also *Moore v. St. Louis Music Supply Co., Inc.*, 539 F.2d 1191, 1193 (8th Cir.1976); *Navarro v. Chief of Police, Des Moines, Iowa*, 523 F.2d 214, 217 (8th Cir.1975). "This balancing process 'focuses in the main upon the degree of egregious conduct which prompted the order of dismissal and to a lesser extent upon the adverse impact of such conduct upon both the defendant and the administration of justice in the District court.'" *Brown v. Frey*, 806 F.2d 801, 804 (8th Cir.1986) (quoting *Moore*, 539 F.2d at 1193). The reviewing court should also consider whether the party whose action was dismissed willfully refused to comply with court orders. "Willful as used in the context of a failure to comply with a court order . . . implies a conscious or intentional failure to act, as distinguished from accidental or involuntary noncompliance." *Welsh*, 439 F.2d at 97.

After reviewing the record as a whole, we conclude that the district court did not abuse its discretion in granting the defendants' motions to dismiss with prejudice the Tribe's action to quiet title. The record supports the district court's finding that the Tribe's failure to comply with the court's orders was intentional or willful, not inad-

vertent or accidental. The Tribe's conduct shows a pattern of noncompliance with court orders.⁵ On June 6, 1989, the magistrate assessed sanctions against the Tribe for failing to comply with the court's January 26, 1989 order compelling discovery. Moreover, on September 29, 1989, the court warned the Tribe that its action would be dismissed unless the Tribe filed an adequate proposed pretrial order by October 16, 1989. The court dismissed the Tribe's quiet title action only after the Tribe failed to heed its warning. *See Mangan v. Weinberger*, 848 F.2d 909, 911 (8th Cir.1988) (finding dismissal with prejudice was appropriate when plaintiff failed to comply with an order to amend his pleadings), *cert. denied*, 488 U.S. 1013, 109 S.Ct. 802, 102 L.Ed.2d 793 (1989); *Henderson v. Duncan*, 779 F.2d 1421, 1425 (9th Cir.1986) (holding court properly dismissed the plaintiff's case after plaintiff's counsel failed to heed the court's warning that failure to submit an acceptable pretrial order would result in dismissal); *Burges v. Sissel*, 745 F.2d 526, 528 (8th Cir.1984) (finding court properly dismissed the plaintiff's claims after he disobeyed three court orders requiring him to amend his pretrial statement).

The district court properly found the Tribe's proposed pretrial order inadequate. First, the Tribe refused to stipulate to any undisputed facts in the proposed pretrial order. The Tribe's proposed pretrial order merely contained a list of separate submissions. To show the extent of the Tribe's recalcitrance, Judge Urbom noted that the Tribe would not even agree that the Tribal Council governs the Omaha Indian Tribe, or that the state of Iowa was admitted to the Union by an act of Congress on December

⁵ Although not a factor here, the same pattern of behavior occurred in the consolidated case. The record in the consolidated case shows that the Tribe was held in contempt on two occasions for violating the district court's orders granting possession of certain lands to the defendants. State of Iowa's App. at 9-14. Moreover, the court dismissed the Tribe's damage claim after the Tribe refused to comply with the court's orders compelling discovery. *Id.* at 7-8.

28, 1846.⁶ The Tribe's behavior clearly violated Magistrate Jarvey's order that the parties "make a good faith attempt to narrow the issues to those truly in dispute." Magistrate's Order at 1-2 (Sept. 13, 1989).

Second, the Tribe's statement of legal issues was inadequate because it contained the fraud allegations. As discussed previously, this court had ruled that the fraud claim was without merit. Moreover, the district court's order dated October 5, 1989 specifically prohibited the Tribe from referring to the fraud claim.

Finally, the Tribe failed to disclose in its proposed pre-trial order or its answers to interrogatories at least six avulsions in Omaha Mission Bend and Monona Bend. The defendants first learned of these avulsions when they deposed the Tribe's expert witnesses late in the discovery process. The Tribe's avulsion theories were critical to this quiet title proceeding. To prevail against the defendant landowners, the Tribe had to show that the disputed lands separated from the Omaha Indian Reservation and moved to the east side of the Missouri River when the river shifted by avulsion. In essence, the Tribe contends that the boundary of the reservation gradually and naturally expanded to include lands in Monona Bend, Omaha Mission Bend, and Blackbird Bend outside the Barrett Survey when the Missouri River moved back toward the Iowa bank by accretion.⁷ The Tribe further argues that the disputed lands

⁶ Counsel for the Tribe, William Veeder, later admitted at the hearing on the issue of sanctions that these facts were uncontroverted. Agricultural Industrial Investment Company's App. at 75-76.

⁷ An accretion is defined as "an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 193, 10 S.Ct. 518, 522, 33 L.Ed. 872 (1890). "[W]here running streams are the boundaries between States, . . . when the bed and channel are changed by the natural and gradual processes . . . [of] erosion and accretion, the boundary follows the varying course of the stream." *Arkansas v. Tennessee*, 246 U.S. 158, 173, 38 S.Ct. 301, 304, 62 L.Ed. 638 (1918).

ended up on the Iowa side of the Missouri River when the river moved back toward Nebraska by avulsion.⁸ The Tribe contends that it still owns the lands which accreted to the reservation even though they were later cutoff from the reservation by avulsion.⁹

The record also suggests that the Tribe intentionally pursued a pattern of delaying tactics. The Tribe filed numerous motions for an extension of time and for reconsideration or stay after the unconsolidated case was reactivated. In *Garrison*, 714 F.2d at 760, this court stated that dismissal with prejudice may be warranted if the plaintiff exhibits egregious conduct by engaging in a pattern of intentional delay.

Although the focus of this review is primarily on the egregiousness of the Tribe's misconduct, we must also consider the hardship to the defendants in determining whether dismissal with prejudice was proper. See *Brown*, 806 F.2d at 804. After reviewing the record, we find that the defendants would be unduly prejudiced if the Tribe was allowed to proceed with its quiet title action. As a

⁸ An avulsion occurs when there is a

sudden change of the banks of a stream such as occurs when a river forms a new course by going through a bend, the sudden abandonment by a stream of its old channel and the creation of a new one, or a sudden washing from one of its banks of a considerable quantity of land and its deposit on the opposite bank.

III *American Law of Property* § 15.26, at 855-56 (1952) (footnotes omitted).

⁹ It is a well-established proposition that

if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

Arkansas, 246 U.S. at 173, 38 S.Ct. at 304.

result of the Tribe's refusal to comply with court orders, the defendants have had to pay excessive expenses and fees. Moreover, the defendants' titles to their property have been under a cloud since the Tribe filed its claim in 1975.

The Tribe also argues that Judge Urbom abused his discretion by dismissing the case with prejudice without allowing the Tribe the opportunity to respond to the defendants' charges that the Tribe misled them or to challenge the defendants' motions to dismiss. We find the Tribe's arguments lack merit. Judge Urbom denied the Tribe's motions for a hearing on these issues only *after* he held a hearing on the issue of sanctions. At the hearing on the issue of sanctions, the Tribe had an opportunity to address the defendants' charges that the Tribe intentionally concealed avulsions and to discuss possible sanctions short of dismissal.

C. Sanctions

The defendants argue that this court should impose just damages and costs against the Tribe for filing a frivolous appeal pursuant to Rule 38 of the Federal Rules of Appellate Procedure. They contend that counsel for the Tribe wrongfully attacked the integrity of the court and its officers. They also argue that the Tribe's appeal improperly focused on the fraud issue.

We find the Tribe's fraud argument frivolous. Many of the Tribe's disrespectful comments about Judge McManus and Judge Urbom relate to the meritless fraud argument. On this basis alone, we assess double the costs of this appeal against the Tribe. See *Anselmo v. Manufacturers Life Ins. Co.*, 771 F.2d 417, 421 (8th Cir. 1985) (imposing sanctions for filing a frivolous appeal). We do not find, however, the appeal of the dismissal on the merits frivolous. This court, as did Judge Urbom, has agonized over the dismissal with prejudice of a party's claim when the primary fault of the dismissal can be traced to the recal-

citance and defiance of its counsel, William Veeder. Yet as the district court pointed out, for new counsel to attempt to master the vast amount of prior pleadings and discovery would indefinitely delay further progress in the case. Mr. Veeder, for whatever strategic purpose, has from the beginning of this overall litigation chosen to make the government, the trial and appellate judges, and the defendants, his targeted enemies. In the Tribe's brief, Mr. Veeder continues to exercise scurrilous disrespect for the judges involved in this case. He stands obsessed with the charges of fraud against the government and the complicity in such fraud by Judges McManus and Urbom. He maintains this charge notwithstanding this court's prior dismissal of such a claim, and he continues to inject this claim into the overall merits of the ejectment action. Mr. Veeder through his continued contumacious refusal to comply with the district court orders has done a great disservice to his client in important litigation. It is unfortunate in a case such as this that the client must live or die by the conduct of its counsel. In *Link v. Wabash R.R.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), the Supreme Court upheld the dismissal of an action on the grounds that the attorney failed to prosecute a claim. The Court stated:

There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have "notice of all facts, notice of which can be charged upon the attorney."

Id. at 633-34, 82 S.Ct. at 1390 (citations omitted).

Once again, we do not review the dismissal de novo. Although the remedy is indeed harsh and prejudicial to the client, we find that the trial court exercised its judgment of discretion within the confines of legal principles. Under the circumstances, we must hold Judge Urbom did not abuse his discretion in dismissing the Tribe's action.

III.

Given the extraordinary facts in this case, we find the district court did not abuse its discretion by granting the defendants' motions to dismiss with prejudice the Tribe's action to quiet title to lands located in Monona Bend, Omaha Mission Bend, and Blackbird Bend outside the Barrett Survey. We also assess double the costs of this appeal against the Tribe for raising the frivolous fraud issue. Accordingly, the judgment of the district court is affirmed.

APPENDIX G

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 90-2133NI

Omaha Indian Tribe,

Appellant,

vs.

Tract I - Blackbird Bend Area, et al.

Appellees.

**Order Denying Petition for Rehearing
With Suggestion for Rehearing En Banc**

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of a lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

July 31, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX H

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 90-2133NI

Omaha Indian Tribe, Treaty of 1854 with the United
States, et al.

vs.

Tract I-Blackbird Bend Area, et al.

Appellees.

**Appeal from the United States District Court
for the Northern District of Iowa**

Appellant's untimely motion for stay of mandate is granted. The mandate of this court issued on August 8, 1991, is hereby recalled. The clerk of the United States District Court is directed to return the recalled mandate.

The issuance of mandate in this case shall be stayed to and including September 21, 1991. If within that time there is filed with the clerk of this court a certificate of the clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

August 21, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gaus

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX I

Syllabus

WILSON ET AL. V. OMAHA INDIAN TRIBE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUITNO. 78-160. Argued March 21, 1970—Decided June 20,
1979*

Pursuant to an 1854 treaty, the reservation of the Omaha Indian Tribe (Tribe) was established in the Territory of Nebraska on the west bank of the Missouri River, with the eastern boundary being fixed as the center of the river's main channel. In 1807, a General Land Office survey established that certain land was included in the reservation but since then the river has changed course several times, leaving most of the survey area on the Iowa side of the river, separated from the rest of the reservation. Residents of Iowa ultimately settled on and improved this land, and these non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs. Three federal actions consolidated in District Court, were instituted by respondents, the Tribe and the United States as trustee of the reservation lands, against petitioners, including the State of Iowa and several individuals. Both sides sought to quiet title in their names, respondents arguing that the river's movement had been avulsive and thus did not affect the reservation's boundary, whereas petitioners argued that the disputed land had been formed by gradual accretion and belonged to the Iowa riparian owners. The District Court held that state rather than federal law should be the basis of decision; that 25 U. S. C. § 194—which provides that "[i]n all trials about the right of property in which an Indian may be a party on one side, and a white person the other, the burden of proof shall rest upon the white person, whenever

* Together with No. 78-161, *Iowa et al. v. Omaha Indian Tribe et al.*, also on certiorari to the same court.

the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership"—was not applicable because the Tribe could not make out a *prima facie* case that it possessed the disputed land in the past without proving its case on the merits; and that under Nebraska law, the changes in the river had been accretive and thus the petitioners were the owners of the disputed area. The Court of Appeals reversed, ruling that federal rather than state law was applicable; that the Tribe had made a sufficient showing to invoke § 194; and that applying the federal common law of accretion and avulsion to the evidence, the evidence was in equipoise and thus, under § 194, judgment must be entered for the Tribe.

Held:

1. The Court of Appeals was partially correct in ruling that § 194 is applicable here: by its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. In view of the history of § 194 and its purpose of protecting Indians from claims made by the non-Indian squatters on their lands, it applies even when an Indian tribe is the litigant rather than one or more individual Indians. But, while Congress was aware that § 194 would be interpreted to cover artificial entities such as corporations as well as individuals, there is nothing to indicate that Congress intended the word "white person" to include any of the States of the Union. Here, there seems to be no question that the disputed land was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the 1854 treaty, and this was enough to bring § 194 into play. In view of the purpose of the statute and its use of the term "presumption" which the "white man" must overcome, § 194 contemplates the non-Indian's shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its *prima facie* case of prior title or possession. Pp. 664-669.

2. The Court of Appeals properly concluded that federal law governs the substantive aspects of the dispute, but it erred in arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Pp. 660-679.

(a) The general rule that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, does not oust federal law in this litigation. Here, the United States has never yielded title or terminated its interest in the property, and in these circumstances, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677. Pp. 660-671.

(b) However, state law should be borrowed as the federal rule of decision here. There is no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute (the location of the boundary between Iowa and Nebraska having been settled by Compact in 1943). Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interests. And this is also an area in which the States have substantial interest in having their own law resolve controversies such as these; there is considerable merit in not having the reasonable expectations, under state real property law, of private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Cf. *Board of Comm'rs v. United States*, 308 U.S. 343; *Arkansas v. Tennessee*, 246 U.S. 158. Pp. 671-676.

(c) Under the construction of the 1943 Compact in *Nebraska v. Iowa*, 400 U.S. 117, Nebraska law should be applied in determining whether the changes in the river

that moved the disputed land from Nebraska to Iowa were avulsive or accretive. Pp. 676-678.

575 F.2d 620, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which all other Members joined, except POWELL, J., who took no part in the consideration or decision of the cases. BLACKMUN, J., filed a concurring opinion, in which BURGER, C.J., joined, *post*, p. 679.

Edson Smith argued the cause for petitioners in No. 78-160. With him on the briefs were *Robert H. Berkshire*, *Thomas R. Burke*, *Lyman L. Larsen*, *Francis M. Gregory, Jr.*, and *Maurice B. Nieland*. *Bennett Cullison, Jr.*, argued the cause for petitioners in No. 78-161. With him on the brief were *Richard C. Turner*, Attorney General of Iowa, and *James C. Davis*, Assistant Attorney General.

William H. Veeder argued the cause and filed a brief for respondent Omaha Indian Tribe in both cases. *Sara Sun Beale* argued the cause for the United States in both cases.

With her on the brief were *Solicitor General McCree, Assistant Attorney General Moorman, Deputy Solicitor General Barnett, Robert L. Klarquist, and Edward J. Shawaker.*†

† Edgar B. Washburn filed a brief for Title Insurance and Trust Co. et al. as *amici curiae* urging reversal in both cases.

A brief of *amici curiae* urging reversal in No. 78-161 was filed for their respective States by *Theodore L. Sendak*, Attorney General of Indiana; *Jane Gootee*, Deputy Attorney General, and *Donald Bogard*, *William J. Harley*, Attorney General of Alabama; *Aerum Gross*, Attorney General of Alaska; *John A. LaSota, Jr.*, Acting Attorney General of Arizona; *William J. Clinton*, Attorney General of Arkansas; *Carl R. Ajello*, Attorney General of Connecticut; *Richard R. Wier, Jr.*, Attorney General of Delaware; *Robert L. Shevin*, Attorney General of Florida; *Ronald Y. Amemiya*, Attorney General of Hawaii; *Wayne L. Kidwell*, Attorney General of Idaho; *William J. Scott*, Attorney General of Illinois; *Curt T. Schneider*, Attorney General of Kansas; *Robert F. Stephens*, Attorney General of Kentucky; *William J. Guste, Jr.*, Attorney General of Louisiana; *Joseph E. Brennan*, Attorney General of Maine; *Francis B. Burch*, Attorney General of Maryland; *Francis X. Bellotti*, Attorney General of Massachusetts; *Frank J. Ketty*, Attorney General of Michigan; *A. F. Summer*, Attorney General of Mississippi; *John D. Ashcroft*, Attorney General of Missouri; *Paul L. Douglas*, Attorney General of Nebraska; *Robert List*, Attorney General of Nevada; *Thomas D. Roth*, Attorney General of New Hampshire; *Toney Anava*, Attorney General of New Mexico; *Louis J. Lefkowitz*, Attorney General of New York; *Rufus L. Edmisten*, Attorney General of North Carolina; *Allen L. Olson*, Attorney General of North Dakota; *William J. Brown*, Attorney General Ohio; *James A. Redden*, Attorney General of Oregon; *Daniel R. McLeod*, Attorney General of South Carolina; *William Janklow*, Attorney General of South Dakota; *William M. Leech, Jr.*, Attorney General of Tennessee; *Robert B. Hansen*, Attorney General of Utah; *M. Jerome Diamond*, Attorney General of Vermont; *J. Marshall Coleman*, Attorney General of Virginia; *Slade Gorton*, Attorney General of Washington; *Chauncey H. Browning Jr.*, Attorney General of West Virginia; *Bronson C. La Follette*, Attorney General of Wisconsin; *John J. Rooney*, Acting Attorney General, and *Jack D. Palma II*, Senior Assistant Attorney General of Wyoming.

Robert S. Peleyger, Richard B. Collins, and Arthur Lazarus, Jr., filed a brief for the Native American Rights Fund et al. as *amici curiae* urging affirmance in both cases.

John C. Christie, Jr., Charles T. Martin, and Stephen J. Landers filed a brief for the American Land Title Assn. as *amicus curiae* in both cases.

A brief of *amici curiae* was filed in No. 78-161 for their respective States by *Evelle J. Younger*, Attorney General, *N. Gregory Taylor*, Assistant Attorney General, and *John Briscoe* and *Bruce S. Flushman*, Deputy Attorneys General, of California; *John L. Will*, Attorney General of Texas; *Mike Greedy*, Attorney General of Montana; *Warren Spannaus*, Attorney General of Minnesota; *Gerald Gornish*, Attorney General of Pennsylvania; and *J.D. MacFarlane*, Attorney General, and *David W. Robbins*, Deputy Attorney General, of Colorado.

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue here is the ownership of a tract of land on the east bank of the Missouri River in Iowa. Respondent Omaha Indian Tribe, supported by the United States as trustee of the Tribe's reservation lands,¹ claims the tract as part of reservation lands created for it under an 1854 treaty. Petitioners, including the State of Iowa and several individuals, argue that past movements of the Missouri River washed away part of the reservation and the soil accreted to the Iowa side of the river, vesting title in them as riparian landowners.²

¹ *Heckman v. United States*, 224 U.S. 413 (1912), the Court explained the source and nature of this trust relationship. In the exercise of its plenary authority over Indian affairs, Congress has the power to place restrictions on the alienation of Indian lands. Where it does so, it continues guardianship over Indian lands and "[d]uring the continuance of this guardianship, the right and duty of the Nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. . . . A transfer of the [Indian land] is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States." *Id.* at 437-438. Accordingly, the United States is entitled to go into court as trustee to enforce Indian land rights. "It [is] not essential that it should have a pecuniary interest in the controversy." *Id.* at 430. See also *Morrison v. Work*, 266 U.S. 481, 485 (1925), *Chooie v. Trapp*, 224 U.S. 665, 678 (1912), F. Cohen, *Handbook of Federal Indian Law* 91-96 (1942).

² The State of Iowa claims title to certain lands deeded to it by quit claim and to the bed of the Missouri between the thalweg (see n.3, *infra*) and the ordinary high-water mark, any islands formed in that portion of the river, and any abandoned channels. The latter claims are based upon the equal-footing doctrine, see *Pollard's Lessee v. Hogan*, 3 How. 212 (1845), and the 1943 Boundary Compact between Iowa and Nebraska see n. 6, *infra*.

Two principal issues are presented. First, we are faced with novel questions regarding the interpretation and scope of Rev. Stat. § 2126, as set forth in 25 U.S.C. § 104, a 145-year-old, but seldom used, statute that provides:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership."

Second, we must decide whether federal or state law determines whether the critical changes in the course of the Missouri River in this case were accretive or avulsive.

I

In 1854, the Omaha Indian Tribe ceded most of its aboriginal lands by treaty to the United States in exchange for money and assistance to enable the Tribe to cultivate its retained lands. Treaty of Mar. 16, 1854, 10 Stat. 1043; see *United States v. Omaha Indians*, 253 U. S. 275, 277-278 (1920). The retained lands proved unsatisfactory to the Tribe, and it exercised its option under the treaty to exchange those lands for a tract of 300,000 acres to be designated by the President and acceptable to the Tribe. The Blackbird Hills area, on the west bank of the Missouri, all of which was then part of the Territory of Nebraska, was selected. The eastern boundary of the reservation was fixed as the center of the main channel of the Missouri River, the *thalweg*.³ That land, as modified by a subsequent treaty and statutes,⁴ has remained the home of the Omaha Indian Tribe.

In 1867, a survey by T. H. Barrett of the General Land Office established that the reservation included a large peninsula jutting east toward the opposite, Iowa, side of the river, around which the river flowed in an oxbow curve known as Blackbird Bend.⁵ Over the next few decades, the

³ The term is commonplace in boundary disputes between riparian States. See, e. g., *Minnesota v. Wisconsin*, 252 U. S. 273, 282 (1920):

"The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. This rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water."

⁴ Treaty of Mar. 6, 1865, 14 Stat. 667; Act of June 22, 1874, 18 Stat. 146, 170; Act of Aug. 7, 1882, 22 Stat. 311; see also Act of Mar. 3, 1885, 23 Stat. 362, 370, as amended by Act of Jan. 7, 1925, ch. 34, 43 Stat. 726.

⁵ There is some dispute over whether the Barrett survey actually marked the reservation boundary because several years had passed since the Tribe began occupying the reservation and the Missouri may have changed its course during that period. See *United States v. Wilson*, 433 F. Supp. 67, 69, 74 (ND Iowa 1977). This does not appear to be of significance in the case. *Id.* at 75.

river changed course several times, sometimes moving east, sometimes west.⁶ Since 1927, the river has been west of its 1867 position, leaving most of the Barrett survey area on the Iowa side of the river, separated from the rest of the reservation.

As the area, now on the Iowa side, dried out, Iowa residents settled on, improved, and farmed it. These non-Indian owners and their successors in title occupied the land for many years prior to April 2, 1975, when they were dispossessed by the Tribe, with the assistance of the Bureau of Indian Affairs.

Four lawsuits followed the seizure, three in federal court and one in state court. The Federal District Court for the Northern District of Iowa consolidated the three federal actions, severed claims to damages and lands outside the Barrett survey area, and issued a temporary injunction that permitted the Tribe to continue possession. The court then tried the case without a jury. At trial, the Government and Tribe argued that the river's movement had been avulsive, and therefore the change in location of the river had not affected the boundary of the reservation. Petitioners argued that the river had gradually eroded the reservation lands on the west bank of the river, and that the disputed land on the east bank, in Iowa, had been formed by gradual accretion and belonged to the east-bank riparian owners.⁷ Both sides sought to quiet title in their names.

⁶ In *Nebraska v. Iowa*, 143 U. S. 359 (1892), the Court decided a boundary dispute between the States of Nebraska and Iowa caused by the wanderings of the Missouri. "[T]he fickle Missouri River," however, "refused to be bound by the . . . decree," Eriksson, *The Boundaries of Iowa*, 25 Iowa J. of Hist. and Pol. 163, 234 (1927); and in 1943 Nebraska and Iowa entered into a Compact fixing the boundary between the States independent of the river's location. Congress ratified the Compact in the Act of July 12, 1943, ch. 220, 57 Stat. 404. Since the time of the Compact, the Army Corps of Engineers has been largely successful in taming the river. See *Nebraska v. Iowa*, 406 U. S. 117, 119 (1972).

⁷ The District Court stated the common-law rule, 433 F. Supp. 57, 62 (1977): "Simply stated, when a river which forms a boundary between two parcels of land moves by processes of erosion and accretion, the boundary follows the movements of the river. *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935). On the other hand, when a river which forms a boundary between two parcels of land abruptly moves

The District Court concluded that state rather than federal law should be the basis of decision. *United States v. Wilson*, 433 F. Supp. 57 (1977). The court interpreted the Rules of Decision Act, 28 U.S.C. § 1652, as not requiring the application of federal law in land disputes, even though the United States and an Indian tribe were claimants,⁸ unless the Constitution, a treaty, or an Act of Congress specifically supplanted state law. The court found no indication in those sources that federal law was to govern. It then went on to conclude that 25 U.S.C. § 104 was not applicable to the case because it was impossible for the Tribe to make out a prima facie case that it possessed the disputed lands in the past without proving its case on the merits. Thus, § 104 had no significance because it was "inextricably entwined with the merits." 433 F.Supp., at 66.⁹

Applying Nebraska law,¹⁰ which places the burden of proof on the party seeking to quiet title, the court concluded that the key changes in the river had been accretive, and that

from its old channel to a new channel through an event known as avulsion, the boundary remains defined by the old river channel. *Iowa Railroad Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). The jurisdiction of Nebraska applies these principles to the movements of the Missouri River. *DeLong v. Olsen*, 63 Neb. 327, 88 N.W. 512 (1901). "This Court has followed the same principles resolving boundary disputes between States bordering on navigable streams. *Arkansas v. Tennessee*, 246 U. S. 158, 173 (1918); *Missouri v. Nebraska*, 196 U. S. 23, 34-36 (1904); *Nebraska v. Iowa*, 143 U. S., at 360-361, 370.

⁸ The District Court relied on *Mason v. United States*, 260 U. S. 545 (1923); *Francis v. Francis*, 203 U.S. 233 (1906); and *Fontenelle v. Omaha Tribe of Nebraska*, 208 F.Supp. 855 (Neb. 1909), *aff'd*, 430 F. 2d 143 (CAS 1970).

⁹ The District Court also suggested that the possessory interest of the Tribe was not of sufficient quality to trigger the burden shifting contemplated by 25 U.S.C. § 194.

¹⁰ The District Court construed the Court's decision in *Nebraska v. Iowa*, 406 U.S. 117 (1972), as requiring the application of Nebraska law with respect to changes in the river that occurred before 1943, the date of the Iowa-Nebraska Compact that permanently fixed the boundary between the States, because the land at issue here was indisputable part of Nebraska before the river changed its course. 433 F. Supp., at 60, and n.2.

the east-bank riparians, the petitioners, were thus the owners of the disputed area. 433 F.Supp. 67 (1977).¹¹

The Court of Appeals reversed. 575 F.2d 620 (CAS 1978). It began by ruling that the District Court should have applied federal rather than state law for two distinct reasons. First, the boundary of the reservation was coincidental with an interstate boundary at the time the river moved. Therefore, under *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977), and other cases of this Court, the governing law is federal because

"[t]he rendering of a decision in a private dispute which would 'press back' an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law." 575 F.2d, at 628.

Second, the Court of Appeals construed our decision in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 677 (1974), as requiring the application of federal law because the Tribe asserted a right to reservation land based directly on the 1854 treaty and therefore arising under and protected by federal law.

The Court of Appeals also ruled that the District Court had erred by refusing to apply 25 U. S. C. § 194. Because the Tribe had proved that the 1854 treaty included the land area within the Barrett survey, it had made a sufficient showing of "previous possession or ownership" to invoke the statute and place the burden of proof on petitioners. Adopting the District Court's construction "would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river." 575 F.2d, at 631.

¹¹ Although the District Court bowed closely to Nebraska case law, it also observed that insofar as the relevant definitions of avulsion and accretion were concerned, there was no significant difference between Iowa and Nebraska law, except that under Iowa law accretion was presumed, which was not the case under Nebraska law. Because Nebraska law would not aid the defendants by a presumption of accretion, the Tribe was favored by the application of Nebraska law. The District Court was also of the view that the federal accretion-avulsion law was not substantially different. As we shall see, the Court of Appeals differed with the District Court in this respect.

Reviewing what it perceived to be the federal common law of accretion and avulsion and with no more than passing reference to Nebraska law on the issue, the Court of Appeals concluded that the District Court had based its ruling on a too narrow definition of avulsion.¹² The court then applied the law to the evidence and found that the evidence was in equipoise. Because § 194 placed the burden of proof on the non-Indians, however, the court ruled that judgment must be entered for the Tribe.

We granted separate petitions for certiorari filed by the State of Iowa and its Conservation Commission in No. 78-161 and by the individual petitioners in No. 78-160, but limited to the questions whether 25 U. S. C. § 194 is applicable in the circumstances of this case, in particular with respect to the State of Iowa, and whether federal or state law governs the substantive aspects of these cases. 439 U.S. 963 (1978).¹³

¹² The Court of Appeals relied on two cases, *Veatch v. White*, 23 F.2d 69 (CA9 1927), and *Uhlhorn v. United States Gypsum Co.*, 366 F.2d 211 (CAS 1966), cert. denied, 385 U.S. 1026 (1967), in concluding that, under federal law, "the sudden, perceptible change of the channel, whether within or without the river's original bed, is a critical factor in defining an avulsion." 575 F.2d 620, 637 (CA8 1978). This definition was broader than the Nebraska rule as understood and applied by the District Court, which the Court of Appeals described as follows: "an avulsion occurs only where a sudden shift in a channel cuts off land 'so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed.'" *Id.*, at 634, quoting 433 F. Supp., at 73. As is evident, the definition employed by the Court of Appeals permits a finding of avulsion even where the river is still largely within its original bed.

¹³ In No. 78-161, filed by the State of Iowa and its Conservation Commission, the questions on which certiorari was granted were stated as follows:

"Whether the State of Iowa is 'a white person', and the Omaha Indian Tribe is 'an Indian' within the meaning of 25 U. S. C. § 194.

"Whether federal law requires divestiture of Iowa's apparent good title to real property located within its boundaries."

In No. 78-160, we granted certiorari on the following questions:

"Whether the Eighth Circuit erroneously construed Title 25 U.S. Code § 194 to make it applicable in this case.

"Whether the Eighth Circuit erred in holding that Federal and not state common law with regard to accretion and avulsion is applicable in this case."

We are in partial, but serious, disagreement with the Court of Appeals, and vacate its judgment.

II

Petitioners challenge on several grounds the Court of Appeals' construction and application of § 194 to these cases.¹⁴ First, they argue that by its plain language the section does not apply when an Indian tribe, rather than one or more individual Indians, is the litigant. We think the argument is untenable. The provision first appeared in slightly different form in 1822, Act of May 6, 1822, 3 Stat. 683, as part of an Act amending the 1802 Indian Trade and Intercourse Act, Act of Mar. 30, 1802, 2 Stat. 139, which was one of a series of Acts originating in 1700 and designed to regulate trade and other forms of intercourse between the North American Indian tribes and non-Indians.¹⁵ Because of recurring trespass upon and illegal occupancy of Indian territory, a major purpose of these Acts as they developed was to protect the rights of Indians to their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions. The 1822 provision was part of this design; and with only slight change in wording, it was incorporated in the 1834 consolidation of the various statutes dealing with Indian affairs. Act of June 30, 1834, 4 Stat. 729. Section 22 of that Act is now 25 U.S.C. § 104, already set out in this opinion. Although the word "Indian" in the second line of § 22 of the 1834 Act replaced the word "Indians" in the 1822 provision, there is no indication that any change in meaning was intended; and none should be implied at this

¹⁴Of these various arguments, only the single ground relied on by the District Court in refusing to apply § 194 was discussed and rejected by the Court of Appeals. The other grounds for holding § 194 inapplicable to this case were presented by petitioners either in their briefs on the merits before the Court of Appeals or their petition for rehearing before that court after it reversed the District Court.

¹⁵The background, history, and development of these laws and Acts are explored exhaustively in F. Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts 1790-1834* (1962). See also Cohen, *supra* n. 1, at 68-75.

late date, particularly in light of 1 U.S.C. § 1, which provides that unless the context indicates otherwise, "words importing the singular include and apply to several persons, parties, or things."

Even construed as including the plural, however, it is urged that the word "Indians" does not literally include an Indian tribe, and that it is plain from other provisions of the Act that Congress intended to distinguish between Indian tribes and individual Indians. But as we see it, this proves too much. At the time of the enactment of the predecessors of § 194, Indian land ownership was primarily tribal ownership; aboriginal title, a possessory right, was recognized and was extinguishable only by agreement with the tribes with the consent of the United States. *Oneida Indian Nation v. County of Oneida*, 414 U. S., at 660-670. Typically, this was accomplished by treaty between the United States and the tribe, and typically the land reserved or otherwise set aside was held in trust by the United States for the tribe itself. "Whatever title the Indians have is in the tribe, and not in the individuals, although held by the tribe for the common use and equal benefit of all the members." *United States v. Jim*, 409 U. S. 80, 82 (1972), quoting *Cherokee Nation v. Hitchcock*, 187 U. S. 294, 307 (1902). It is clear enough that, when enacted, Congress intended the 1822 and 1834 provisions to protect Indians from claims made by non-Indian squatters on their lands. To limit the force of these provisions to lands held by individual Indians would be to drain them of all significance, given the historical fact that at the time of the enactment virtually all Indian land was tribally held. Legislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them." *Oliphant v. Suquamish Indian Tribe*, 435 U. S. 191, 206 (1978). Furthermore, "statutes passed for the benefit of dependent Indian tribes...are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U. S. 373, 392 (1976), quoting *Alaska Pacific Fisheries, v. United States*, 248 U. S. 78, 80 (1918).

The second argument, presented in its most acute form by the State of Iowa, is that §194 applies only where the Indians' antagonist is an individual white person and has no force at all where the adverse claimant is an artificial entity.¹⁶ We cannot accept this broad submission. The word "person" for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1. And in terms of the protective purposes of the Acts of which §104 and its predecessors were a part, it would make little sense to construe the provision so that individuals, otherwise subject to its burdens, could escape its reach merely by incorporating and carrying on business as usual. As we said in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 687 (1978), "by 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis."¹⁷ It stands to reason that in re-enacting this provision in the Revised Statutes, now codified in the United States Code, Congress was fully aware that it would be interpreted to cover artificial entities as well as individuals.

It nevertheless does not follow that the "white persons" to whom will be shifted the burden of proof in title litigation with Indians also include the sovereign States of the Union. "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941); accord, *United States v. Mine Workers*,

¹⁶ Petitioners cite *United States v. Perryman*, 100 U.S. 235 (1880), as support for their position that § 194 must be construed literally to apply only to a "white person," or individual Caucasian. But that case dealt with another provision of the 1834 Nonintercourse Act, § 16, and there were distinct grounds in the legislative history indicating that the term "white person" as used in § 16 did not include a Negro. Whether *Perryman* would be followed today is a question we need not decide.

¹⁷ There were two corporate defendants among the parties in the District Court. They filed a separate petition for certiorari, No. 78-162, *RGP, Inc. v. Omaha Indian Tribe*, but no action has yet been taken on it. Under our Rules, however, the two corporations are party-respondents in the cases in which we have granted certiorari. Rule 21 (4).

330 U.S. 258, 275 (1947). Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *United States v. Knight*, 14 Pet. 301, 315 (1840). There is nevertheless "no hard and fast rule of exclusion," *United States v. Cooper Corp.*, *supra*, at 604-605; and much depends on the context, the subject matter, legislative history, and executive interpretation. The legislative history here is uninformative, and executive interpretation is unhelpful with respect to this dormant statute. But in terms of the purpose of the provision—that of preventing and providing remedies against non-Indian squatters on Indian lands—it is doubtful that Congress anticipated such threats from the States themselves or intended to handicap the States so as to offset the likelihood of unfair advantage. Indeed, the 1834 Act, which included § 22, the provision identical to the present § 194, was "intended to apply to the whole Indian country, as defined in the first section." H. R. Rep. No. 474, 23d Cong., 1st Sess., 10 (1834). Section 1 defined Indian country as being "all that part of the United States west of the Mississippi, and not within the states of Missouri and Louisiana, or the territory of Arkansas, and, also, that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished . . ." 4 Stat. 720. Although this definition was discarded in the Revised Statutes, see Rev. Stat. § 5596, it is apparent that in adopting § 22 Congress had in mind only disputes arising in Indian country, disputes that would not arise in or involve any of the States.

Nor have we discovered anything since its passage or in connection with the definition of Indian country now contained in the Criminal Code, 18 U.S.C. § 1151, indicating that Congress intended the words "white person" in § 194 to include any of the original or any of the newly admitted States of the Union. We hesitate, therefore, to hold that the State of Iowa must necessarily be disadvantaged by § 104 when litigating title to the property to which it claims ownership, particularly where its opposition is an organized Indian tribe litigating with the help of the United States of America. It may well be that a State, like other litigants and like the

State of Iowa did in this case, will often bear the burden of proof on various issues in litigating the title to real estate. But § 194 operates regardless of the circumstances once the Tribe or its champion, the United States, has demonstrated that the Tribe was once in possession of or had title to the area under dispute.

Petitioners also defend the refusal of the District Court to apply § 194 on the grounds that a precondition to applying it is proof of prior possession or title in the Indians and that this involves the merits of the issue on which this case turns—whether the changes in the river were avulsive or accretive. We think the Court of Appeals had the better view of the statute in this regard. Section 194 is triggered once the Tribe makes out a *prima facie* case of prior possession or title to the particular area under dispute. The usual way of describing real property is by identifying an area on the surface of the earth through the use of natural or artificial monuments. There seems to be no question here that the area within the Barrett survey was once riparian land lying on the west bank of the Missouri River and was long occupied by the Tribe as part of the reservation set apart for it in consequence of the treaty of 1854. This was enough, it seems to us, to bring § 194 into play. Of course, that would not foreclose the State of Iowa from offering sufficient evidence to prove its own title or from prevailing on any affirmative defenses it may have.

Petitioners also assert that even if § 194 is operative and even if the Tribe has made out its *prima facie* case, only the burden of going forward with the evidence, and not the burden of persuasion, is shifted to the State. Therefore they, the petitioners, should prevail if the evidence is in equipoise. The term “burden of proof” may well be an ambiguous term connoting either the burden of going forward with the evidence, the burden of persuasion, or both. But in view of the evident purpose of the statute and its use of the term “presumption” which the “white man” must overcome, we are in agreement with the two courts below that § 194 contemplates the non-Indian’s shouldering the burden of persuasion as well as the burden of producing evidence once the tribe has made out its *prima facie* case of prior title or

III

A

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977), this Court held that, absent an overriding federal interest, the laws of the several States determine the ownership of the banks and shores of waterways. This was expressive of the general rule with respect to the incidents of federal land grants:

"We hold the true principle to be this, that whenever the question in any Court, state or federal, is, *whether* a title to land which had once been the property of the United States has passed, that question must be resolved by the laws of the United States; but that *whenever*, according to those laws, *the title shall have passed*, then that property, like all other property in the state, is *subject to state legislation*; so far as that legislation is consistent with the admission that the title passed and vested according to the laws of the United States." *Id.*, at 377, quoting *Wilcox v. Jackson*, 13 Pet. 498, 517 (1839) (emphasis added by the *Corvallis* Court).

The Court's conclusion in the particular dispute before it in *Corvallis* was that state law governed the rights of the riparian owner because there was no claim of an applicable federal right other than the equal-footing origin of the State's title.

As the Court of Appeals held, however, the general rule recognized by *Corvallis* does not oust federal law in this case. Here, we are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest. The area within the survey was part of land to which the Omahas had held aboriginal title and which was reserved by the Tribe and designated by the United States as a reservation and the Tribe's permanent home. The United States continues to hold the reservation lands in trust for the Tribe and to recognize the Tribe pursuant to the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. § 461 *et seq.*

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law, "wholly apart from the application of state law principles which normally and separately protect a valid right of possession." *Oneida Indian Nation v. County of Oneida*, 414 U. S., at 677. It is rudimentary that "Indian title is a matter of federal law and can be extinguished only with federal consent" and that the termination of the protection that federal law, treaties, and statutes extend to Indian occupancy is "exclusively the province of federal law." *Id.*, at 670. Insofar as the applicable law is concerned, therefore, the claims of the Omahas are "clearly distinguishable from the claims of land grantees for whom the Federal Government has taken no such responsibility." *Id.*, at 684 (REHNQUIST, J., concurring). This is not a case where the United States has patented or otherwise granted lands to private owners in a manner that terminates its interest and subjects the grantees' incidents of ownership to determination by the applicable state law. The issue here is whether the Tribe is no longer entitled to possession of an area that in the past was concededly part of the reservation as originally established. That question, under *Oneida*, is a matter for the federal law to decide.¹⁸

¹⁸Petitioners claim that *Oklahoma v. Texas*, 258 U.S. 574 (1922), mandates the applicability of state rather than federal law in this case. But there the United States issued patents granting former reservation lands. The Court merely held that, absent contrary evidence, when the United States conveyed and completely parted with its territory, even though Indian land, it intended the incidents of the resulting ownership to be determined by state law. This is no more than the general rule that *Oneida* recognized. In the present case, of course, the area at issue was never conveyed away by the United States or by the Tribe and is claimed by the United States and the Tribe to remain as part of the reservation established as the result of the treaty of 1854. Neither do we find that *United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206 (1943), presents a contrary holding. There, the Court refused to construe a federal statute permitting the Secretary of the Interior to grant permission for the opening of highways over Indian land "in accordance with the laws of the state" as prohibiting the establishment of a power line in the highway right-of-way without further federal consent. *Id.*, at 208. As we understand that case, the Court held only that the consent authorized by the federal statute included the uses which such consent would authorize under state law.

B

Although we have determined that federal law ultimately controls the issue in this case, it is still true that “[c]ontroversies . . . governed by federal law, do not inevitably require resort to uniform federal rules Whether to adopt state law or to fashion a nationwide federal-rule is a matter of judicial policy ‘dependent upon a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law.’” *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 727-728 (1979), quoting *United States v. Standard Oil Co.*, 332 U.S. 301, 310 (1947).¹⁹ The Court of Appeals, noting the existence of a body of federal law necessarily developed by this Court in the course of adjudicating boundary disputes between States having their common border on a navigable stream, purported to find in those doctrines the legal standards to apply in deciding whether the changes in the course of the Missouri River involved in this case had been avulsive or accretive in nature.

The federal law applied in boundary cases, however, does not necessarily furnish the appropriate rules to govern this case. No dispute between Iowa and Nebraska as to their common border on or near the Missouri River is involved here. The location of that border on the ground was settled by Compact in 1943 and by further litigation in this Court, *Nebraska v. Iowa*, 406 U.S. 117 (1972). The federal interest in this respect has thus been satisfied, except to the extent that the Compact itself may bear upon a dispute such as this. *United States v. Kimbell Foods, Inc.*, *supra*, advises that at this juncture we should consider whether there is need for a nationally uniform body of law to apply in situations comparable to this, whether application of state law would

¹⁹Compare P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System* 768 (2d ed. 1973):

“The federal ‘command’ to incorporate state law may be a judicial rather than a legislative command; that is, it may be determined as a matter of choice of law, even in the absence of statutory command or implication, that, although federal law should ‘govern’ a given question, state law furnishes an appropriate and convenient measure of the content of this federal law.”

frustrate federal policy or functions, and the impact a federal rule might have on existing relationships under state law. An application of these factors suggests to us that state law should be borrowed as the federal rule of decision here.

First, we perceive no need for a uniform national rule to determine whether changes in the course of a river affecting riparian land owned or possessed by the United States or by an Indian tribe have been avulsive or accretive. For this purpose, we see little reason why federal interests should not be treated under the same rules of property that apply to private persons holding property in the same area by virtue of state, rather than federal, law. It is true that States may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied evenhandedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute. We should not accept "generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect [federal interests]." *United States v. Kimbell Foods, Inc.*, *supra*, at 730.

Furthermore, given equitable application of state law, there is little likelihood of injury to federal trust responsibilities or to tribal possessory interest. On some occasions, Indian tribes may lose some land because of the application of a particular state rule of accretion and avulsion, but it is as likely on other occasions that the tribe will stand to gain. The same would be the case under a federal rule, including the rule that the Court of Appeals announced in this case. The United States fears a hostile and unfavorable treatment at the hands of state law, but, as we have said, the legal issues are federal and the federal courts will have jurisdiction to hear them. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974). Adequate means are thus available to insure fair treatment of tribal and federal interests.

This is also an area in which the States have substantial interest in having their own law resolve controversies such

as these. Private landowners rely on state real property law when purchasing real property, whether riparian land or not. There is considerable merit in not having the reasonable expectations of these private landowners upset by the vagaries of being located adjacent to or across from Indian reservations or other property in which the United States has a substantial interest. Borrowing state law will also avoid arriving at one answer to the avulsive-accretion riddle in disputes involving Indians on one side and possibly quite different answers with respect to neighboring land where non-Indians are the disputants. Indeed, in this case several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by the federal rule announced by the Court of Appeals.

We have borrowed state law in Indian cases before. In *Board of Comm'rs v. United States*, 308 U.S. 343 (1939), the question was what law, federal or state, would apply in a claim to recover taxes improperly levied by a political subdivision of a State upon Indians' trust lands. The Court observed that "[s]ince the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas." *Id.*, at 349-350. The Court, nevertheless, elected to adopt state law as the federal rule of decision. There was no reason in the circumstances of the case for the beneficiaries of federal rights to have a privileged position over other aggrieved taxpayers, and "[t]o respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."²⁰

²⁰ See *Board of Comm'rs v. United States*, 308 U.S., at 351-352:

"Having left the matter at large for judicial determination within the framework of familiar remedies equitable in their nature, see *Stone v. White*, 301 U. S. 532, 534, Congress has left us free to take into account appropriate consideration of 'public convenience,' Cf. *Virginian Ry. Co. v. Federation*, 300 U.S. 515, 552. Nothing seems to us more appropriate than due regard for local institutions and local interests. We are concerned with the interplay between the rights of Indians under federal guardianship and the local repercussion of those rights. Congress has not been heedless of the interests of the states in which Indian lands were situated, as reflected

The importance of attending to state law, once an interstate boundary has been determined, is underlined by *Arkansas v. Tennessee*, 246 U.S. 158 (1918). In that case, because the disputed boundary between Arkansas and Tennessee had been determined, the question of title to riparian land and to the river bottom was a matter to be determined by local law:

"How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the State to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located." *Id.*, at 175-176.

Likewise, in the present case, the Compact of 1943 settled the location of the interstate boundary, within and without the river; and the question of land ownership within or adjacent to the river is best settled by reference to local law even where Indian trust land, a creature of the federal law, is involved.

by their local laws. See, e.g., § 5 of the General Allotment Act of 1887, 24 Stat. 388, 389. With reference to other federal rights, the state law has been absorbed, as it were, as the governing federal rule not because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy. See *Brown v. United States*, 263 U.S. 78; *Seaboard Air Line R. Co. v. United States*, 261 U.S. 209. In the absence of explicit legislative policy cutting across state interests, we draw upon a general principle that the beneficiaries of federal rights are not to have a privileged position over other aggrieved tax-payers in their relation with the states or their political subdivisions. To respect the law of interest prevailing in Kansas in no wise impinges upon the exemption which the Treaty of 1861 has commanded Kansas to respect and the federal courts to vindicate."

C

The passage quoted above from *Arkansas v. Tennessee* was quoted with approval in *Nebraska v. Iowa*, 406 U.S. 117, 126-127 (1972), where the central question was the interpretation of the Interstate Compact determining the location of the entire border between Nebraska and Iowa.²¹ Our opinion in *Nebraska v. Iowa* is also instructive with respect to which state law, Iowa or Nebraska, the federal court should refer to in determining the federal standard applicable to this case.

Under § 2 of the Compact, each State ceded to the other and relinquished jurisdiction over all lands within the Compact boundary of the other State. Under § 3, "Titles, mortgages, and other liens" affecting such lands that are "good in" the ceding State "shall be good in" the other State.²²

Thus, ceded lands east of the Compact line came under Iowa jurisdiction; but Iowa was obligated to respect title to any ceded land east of the new boundary if that title was "good in" Nebraska. Accepting the Special Master's recommendations in this respect, the Court ruled that one claiming a Nebraska title to land east of the Compact line need show only "good title" under Nebraska law and need not also prove either the location of the original boundary between the two States or that the land at issue was on the Nebraska side of that original boundary. The Court further ruled, in agreement with the Special Master, that in litigating with private claimants seeking to prove good Nebraska title to land east of the

²¹ The Special Master in that case observed that, although it would be difficult, the location of the agreed-upon boundary in the Compact could be determined with reasonable accuracy. Report of Special Master in *Nebraska v. Iowa*, O. T. 1964, No. 17 Orig., p. 50.

²² See 1943 Iowa Acts, ch. 306, as ratified by Act of July 12, 1943, ch. 220, 57 Stat. 494;

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

Compact line, the State of Iowa was disentitled to rely on certain doctrines of Iowa common law bearing an riparian land ownership.²³

In this case, the District Court ruled that even though the United States and an Indian tribe rather than private parties were plaintiffs, title to the Barrett survey land, which was once in Nebraska but is now unquestionably in Iowa, should be governed by Nebraska law in accordance with the terms of the Compact. Proceeding to adjudicate the case in accordance with Nebraska law, the District Judge found that the Tribe and the Government, respondents here, had failed to prove that the Blackbird Bend area had been separated from the rest of the reservation by avulsive changes in the Missouri River and that the defendants, petitioners here, without the aid of any presumption of accretion available under Iowa law if applicable, had instead proved that the river changes had been by accretion. In the course of arriving at this conclusion, the District Court, relying on Nebraska cases, rejected the Government's definition of avulsion, later embraced by the Court of Appeals, as contrary to the common law of Nebraska. The defendants, petitioners here, having carried the burden of proving their good title to the land at issue, were entitled to a decree quieting title in them.

Although we have already held that the District Court erred in concluding that determination of titles to reservations lands is not a matter for the federal law, we have also indicated that the federal law should incorporate the applicable state property law to resolve the dispute. Therefore, it seems to us that the District Court reached the correct result in ruling that under the construction of the Compact in *Nebraska v. Iowa*, Nebraska law should be applied in determining whether the changes in the river that moved the Blackbird Bend area from Nebraska to Iowa had been avulsive or accretive. It

²³ Under this ruling, Iowa was disentitled, either as plaintiff or defendant, from invoking its presumption that changes in the Missouri had been accretive rather than avulsive, and could not rely on its rule that no person can claim adversely against the sovereign State of Iowa. Thus, a title based on adverse possession good under Nebraska law would be good in Iowa. Report of Special Master, *supra*, at 174-175.

should also be noted that the District Court, although wrong in wholly rejecting the applicability of § 194, concluded as a matter of fact and law that the defendants, petitioners here, had carried the burden of persuasion normally incumbent upon a plaintiff in a quiet-title action, and had proved by a preponderance of the evidence that the reservation lands had eroded and had accreted to the Iowa shoreline. Apparently for this reason, the trial judge observed at the end of his memorandum opinion that were he wrong in refusing to apply § 194, his findings and conclusions "would not be altered by any different allocation of the burden of persuasion." 433 F. Supp., at 67.

IV

In sum, the Court of Appeals was partially correct in ruling that § 194 was applicable in this case. By its terms, § 194 applies to the private petitioners but not to petitioner State of Iowa. We also agree with the Court of Appeals' conclusion that federal law governed the substantive aspects of the dispute, but find it in error for arriving at a federal standard, independent of state law, to determine whether there had been an avulsion or an accretion. Instead, the court should have incorporated the law of the State that otherwise would have been applicable which, as we have said, is the law of Nebraska. Of course, because of its view of the controlling law, the Court of Appeals did not consider whether the District Court had correctly interpreted Nebraska law and had properly applied it to the facts of this case. These tasks are still to be performed, and we vacate the Court of Appeals' judgment and remand the case for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring.

I join the Court's opinion, but I write briefly to add a comment about my views as to the scope of 25 U.S.C. § 194.

Section 194 applies to a property dispute between an Indian and a "white person." The property dispute here is between Indians, on the one hand, and on the other, nine individuals, two corporations, and the State of Iowa. See 575 F.2d 620, 622 (CA8 1978). The Court holds that "white person" includes an artificial entity and thus that § 194 applies in the dispute between the Omahas and the two corporate petitioners. *Ante*, at 666-667. Contrariwise, the Court holds that "white person" does not include a sovereign State, and thus that § 194 does not apply in the dispute between the Omahas and petitioner State of Iowa. *Ante*, at 667-668, 678. The Court, however, does not expressly discuss § 194's applicability to the nine individual claimants.

Since the Court nevertheless holds that "§ 194 applies to the private petitioners" without exception, *ante*, at 678, it must be proceeding on one of two assumptions. The Court could assume, first, that all nine individual petitioners are Caucasians, and hence each literally is a "white person" under § 194. There is no evidence in the record, however, as to the race of these individuals. See Brief for Petitioners in No. 78-160, p.30; Brief for United States 32 n. 25; Tr. of Oral Arg. 13. Since the burden of proving the factual predicate for § 194's applicability presumably rests on the Indians who seek to invoke it, the Court, in holding § 194 applicable to the individual petitioners here, could not properly rely on this first possible assumption.

The Court could assume, second, that "white person" in § 104 refers, not to a Caucasian, but to a "non-Indian" individual. On this assumption, the race of the individual petitioners (so long as they are not Indians) would be irrelevant in determining § 194's applicability. That this is in fact the assumption the Court makes is suggested by its decision to ignore the adjective "white" in holding each of the corporate petitioners to be a "white person" and by its refusal to follow *United States v. Perryman*, 100 U.S. 235 (1880), where it was held that "white person," as used in another section of the Non-Intercourse Act, did not include a Negro. *Ante*, at 666 n. 16.

The Court seems to hold implicitly, therefore, that "white person" in § 194 includes any "non-Indian" individual. I would prefer to make this holding explicit. In my view, any other construction of § 194 would raise serious constitutional questions. To construe § 194 as applicable to disputes between Indians and Caucasians, but not to disputes between Indians and black or oriental individuals, would create an irrational racial classification highly questionable under the Fifth Amendment's equal protection guarantee. To avoid this result, § 194's reference to a "white person" must be read to mean any "non-Indian" individual or entity, and I so interpret the Court's holding today. To the extent that *Perryman* is inconsistent with this reading, I must regard that case as overruled *sub silentio*.

APPENDIX J

OMAHA INDIAN TRIBE, TREATY OF 1854 WITH the UNITED STATES (10 Stat. 1043). Organized pursuant to the Act of 6/18/34 (48 Stat. 984; 25 USC 476) as amended, Appellant,

v.

Roy Tibbals WILSON, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company, the State of Iowa, Darrell L. Harold, Harold M. and Luea Sorenson, State Conservation Commission of the State of Iowa, Appellees.

UNITED STATES of America,
Appellant

v.

Roy Tibbals WILSON, Charles G. Lakin, Florence Lakin, R. G. P. Incorporated, an Iowa corporation, Harold Jackson, Otis Peterson, Travelers Insurance Company and the State of Iowa, Appellees,

Nos. 77-1384 and 77-1387.

United States Court of Appeals,
Eighth Circuit.

Submitted June 13, 1977.

Decided April 11, 1978.

Rehearing and Rehearing En Banc
Denied May 2, 1978.

William H. Veeder, Washington, D.C., for Omaha Indian Tribe (appellant).

James W. Moorman, Acting Asst. Atty. Gen., Edward J. Shawaker (argued) and Edmund B. Clark, Attys., Washington, D.C., Dept. of Justice, on brief, for United States (appellant).

Edson Smith (on brief), of Swarr, May, Smith & Andersen, Omaha, Neb., and Peter J. Peters (on brief), of Peters, Campbell & Pearson, Council Bluffs, Iowa, argued; Robert

H. Berkshire, Omaha, Neb., Thomas R. Burke and Lyman L. Larsen, Omaha, Neb., Bennett Cullison, Jr., Harlan, Iowa, Lowell C. Kindig, Sioux City, Iowa, and Richard C. Turner, Atty. Gen., and James C. Davis, Asst. Atty. Gen., Des Moines, Iowa, on brief, for appellees.

Before LAY, STEPHENSON and HENLEY, Circuit Judges.

LAY, Circuit Judge.

On March 16, 1854, the Omaha Indian Tribe entered into a treaty with the United States in which certain lands, including 2,900 acres of land located in the then Territory of Nebraska in an area known as Blackbird Bend, were reserved by the Tribe as part of an agreement which ceded to the United States all other land west of the "centre of the main channel of said Missouri river . . ."¹ Act of March 16, 1854, Art. 1, 10 Stat. 1043. At the time the Omaha Indian Reservation was established the reserved land within Blackbird Bend was situated on the west side of the Missouri River. However, by 1923 the river had moved more than two miles to the west of the original boundary line so that much of the land contained within the original Blackbird Bend area was situated on the east side of the river. The defendants assert that early movements of the Missouri River had completely washed away the Reservation lands and that the land now existing within the former boundaries of the Barrett Survey is soil which has accreted to the Iowa riparian land.

¹ The treaty was entered into by George W. Manypenny, Commissioner on the part of the United States, ratified by the United States Senate and signed by President Franklin Pierce on the 21st day of June 1854. "Marks" indicating agreement of the Tribe were made by the then Chiefs of the Omaha Indian Tribe: Shon-ga-ska, or Logan Fontenelle; E-sta-mah-za, or Joseph Le Flesche; Gra-tah-mah-je, or Standing Hawk; Gah-he-ga-gin-gah, or Little Chief; Tah-wah-gah-ha, or Village Maker; Wah-no-ke-ga, or Noise; and So-da-nah-ze, or Yellow Smoke. In addition to providing for the cession of land to the United States and defining the limits of the Reservation's boundary, the Omaha Tribe agreed to vacate all other lands acknowledging their complete dependence on the government of the United States. Art. 10. The United States agreed to pay certain monies over the ensuing 40 years and to aid the Tribe by various affirmative means to "advance them in civilization." Art. 4. The other articles of the treaty include several specific covenants and pledges exchanged between the United States and the Tribe. See Act of March 16, 1854, 10 Stat. 1043.

As a result of this dispute the United States and the Omaha Indian Tribe, a duly organized corporate body, in 1975 sought equitable relief asserting their right to the 2,900 acres of land not situated in Monona County, Iowa. The United States throughout this litigation acts in the capacity of trustee of the Tribe's reservation lands.² The defendants claim title to the land in dispute and seek by way of counter-claims to quiet title in their names. The defendants are Roy Tibbals Wilson, Harold Jackson, a tenant of Roy Tibbals Wilson, Harold Sorenson, Luea Sorenson, Darrell L. Sorenson, Harold M. Sorenson, Charles Lakin, Florence Lakin, the State of Iowa and the State Conservation Commission, R.G.P. Incorporated, Travelers Insurance Company, mortgagee of R.G.P., and Otis Peterson, a tenant of R.G.P.

From at least the 1940's until April 2, 1975, the defendants and their predecessors in title had occupied, cleared and cultivated the land in dispute. After April 2, 1975, with the assistance of the Bureau of Indian Affairs and with the approval of the United States, the Omaha Indian Tribe seized possession of the land and is presently farming it. After the Tribe had seized the land the United States District Court, the Honorable Edward J. McManus presiding, granted a preliminary injunction permitting occupancy of the land by the Tribe during the pendency of this litigation, but requiring certain accounting procedures pertaining to the crops grown on the land be instituted. Following trial and entry of judgment in favor of the defendants, this court on May 13, 1977, entered a stay pending appeal maintaining in effect the terms of the district court's preliminary injunction.

After a lengthy trial the district court, the Honorable Andrew W. Bogue, presiding, found that the boundary of the Omaha Indian Reservation had shifted with the movements of the Missouri River and quieted title in the defendant

² While Indians have the right of use and occupancy to tribal lands, the United States holds the land as a trustee for the benefit of the Indians. See *Morrison v. Work*, 266 U.S. 481, 485, 45 S.Ct. 149, 69 L.Ed.394 (1925). See also *Choate v. Trapp*, 224 U.S. 665, 678, 32 S.Ct. 565, 56 L.Ed. 941 (1912); *United States v. Rickert*, 188 U.S. 432, 442-43, 23 S.Ct. 478, 47 L.Ed. 532 (1903). F. Cohen, *Handbook of Federal Indian Law* 94-95 (AMS Press ed. 1972).

landowners. The court found that the plaintiffs had failed to prove that the river movements were controlled by the doctrine of avulsion and held that the river had changed by reason of the erosion of reservation land and accretion to Iowa riparian land. *United States v. Wilson*, 433 F.Supp. 67 (N.D. Iowa 1977). The district court supplemented its findings on the merits with an opinion resolving choice of law problems, setting forth principles governing avulsion and accretion and discussing the allocation of the burden of proof. *United States v. Wilson*, 433 F.Supp.57 (N.D.Iowa 1977).

1. *The Issues.*

This dispute centers on the ownership of land in an area known as Blackbird Bend which was surveyed in 1867 by T.H. Barrett³ on behalf of the General Land Office of the United States.⁴ The basic issue on appeal is whether the boundary of the reservation remained at its 1854 location despite the significant changes in the location of the Missouri River since that time.

We vacate the judgment of the district court rendered in favor of the defendants; we find the trial court erroneously placed the burden of proof on the Omaha Indian Tribe and failed to properly apply governing principles of federal law

³ Barrett's survey established the meander line for the Nebraska shore of the Missouri River.

⁴ Claims to land outside of an area described by the 1867 Barrett Survey were severed from the present case. The trial court explained the severance as follows:

Approximately 8000 acres of land claimed by the Omaha Indian Tribe in C75-4067 and all issues of damages were severed. The severance of the Barrett Survey Area from the other claims of the Omaha Indian Tribe was necessary because the Barrett Survey line is the only clearly ascertainable line of demarkation, and was the boundary of the area of which the Tribe received possession by virtue of a preliminary injunction entered June 5, 1975. Thus as to the Barrett Survey Area the action was construed as an equitable quiet title action, and the demands of various defendants for a jury trial were denied as to that area. As to lands claimed by the Tribe outside the Barrett Survey Area, the action was treated as a legal action for ejectment, in which defendant's demands for a jury trial may be sustainable. This left the 2900 acres within the Barrett Survey as the subject matter of this trial since the dispute over that land is common to all three lawsuits. *United States v. Wilson*, 433 F.Supp. 67, 69 (N.D.Iowa 1977).

relating to avulsion and accretion; we hold the evidence is too speculative and uncertain to show that the reservation boundary shifted by reason of accretion and that the defendants have failed to overcome the presumptive right of possession and title in the Tribe to the reservation lands.

II. *The Historical Facts.*

The Treaty of 1854 established the eastern boundary of the reserved land at the center of the main channel of the Missouri River.⁵ Because the exact location of the thalweg⁶

⁵ Article One of the treaty provided in part:

The Omaha Indians cede to the United States all their lands west of the Missouri river, and south of a line drawn due west from a point in the centre of the main channel of said Missouri river due east of where the Ayoway river disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of said line: *Provided, however,* that if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them.

Act of March 16, 1854, Art. 1, 10 Stat. 1043.

⁶ The word thalweg is derived from the German language and is said to be

(t)he channel continuously used for navigation. In other words, the thalweg is not a boundary line but in fact a boundary area, because the channel of a river is never a precise line. De la Pradelle emphasizes this special character in one of his definitions: the thalweg is that specific area in the river which is in practice the variable route followed by boatmen on their way down the river.

Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 Int'l & Comp.L.Q. 789, 793 (1963) (footnote omitted).

The United States Supreme Court adopted the thalweg principle as the standard rule for establishing interstate boundaries in *Iowa v. Illinois*, 147 U.S. 1, 10, 13 S.Ct. 239, 37 L.Ed. 55 (1893). Later, in *Minnesota v. Wisconsin*, 252 U.S. 273, 40 S.Ct. 313, 64 L.Ed. 558 (1920), the Court explained the purpose of the rule.

The doctrine of *Thalweg*, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely

of the Missouri River could not now be established and since the Barrett Survey was conducted only a few years after the reservation was established, the trail court accepted the Barrett Survey as representing the original location of the reservation's boundary.⁷ See Plate I.

From 1854 until sometime near 1875 it is generally accepted that the Missouri River moved east until it reached the Iowa easterly high bank.⁸ The evidence shows the river was approximately 800 feet wide at that time. The first controversial movement of the river in this case occurred after it reached its easterly position against the high bank.⁹ By

because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

Id. at 282, 40 S.Ct. at 319.

See also *New Jersey v. Delaware*, 291 U.S. 361, 381, 54 S.Ct. 407, 78 L.Ed. 847 (1934); *Louisiana v. Mississippi*, 202 U.S. 1, 49, 26 S.Ct. 408, 50 L.Ed. 913 (1906); *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211, 215 (8th Cir. 1966); *Whiteside v. Norton*, 205 F. 5, 9 (8th Cir. 1913); 1 C. Hyde, *International Law* § 138 (2d rev. ed. 1951), 8 Op. Att'y Gen. 175 (1856).

⁷ Although the exact words used in acts of Congress defining the boundaries of a state may vary (for example, "middle of the river," "middle of the main channel," "mid-channel" or "middle thread of the channel") the Supreme Court has presumed that since "[i]t is the free navigation of the river . . . that States demand shall be secured to them", *Iowa v. Illinois*, *supra*, 147 U.S. at 13, 13 S.Ct. at 243, quoting *Buttenueth v. St. Louis Bridge Co.*, 123 Ill. 535, 17 N.E. 439 (1888), in the absence of a contrary agreement, the middle of the main channel, the thalweg, establishes the interstate boundary. *Iowa v. Illinois*, *supra*, 147 U.S. at 13, 13 S.Ct. 239.

⁸ There is no disagreement as to the Tribe's description that:

The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.

It commences at a point on the Easterly High Bank located approximately 2,200 feet southwesterly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P.M., continuing down said Easterly High Bank a distance of approximately 3½ miles to a point on the Easterly High Bank approximately 4,900 feet northwesterly of the common corner of Sections 4, 5, 8, and 9, T. 83 N., R. 46 W. of the 5th P.M.

⁹ The exact time at which the river reached and then left the easterly high bank is not certain. All parties agree the 1875 atlas map, see generally Plate I, showing the river against the high bank could have been prepared

1879 a survey conducted by the Missouri River Commission showed the river, at high flood stage, to be almost 10,000 feet wide covering as much as two-thirds of the Barrett Survey meander lobe. The thalweg had shifted from against the easterly high bank to a point nearly 6,000 feet to the west. *See Plate II.*

After 1879 the river moved to the northeast until it reached the Iowa northerly high bank¹⁰ sometime near 1912. *See Plate III.* The second dispute between the parties involved the movement of the river away from its northerly high bank location to a location significantly to the south in the period between about 1912 and 1923. *See Plate IV.* By 1923 almost the entire peninsula described by the Barrett Survey had been cut off by the river's movement.

¹⁰The Tribe describes the northerly high bank as

"a natural monument demarking the furthest migration northward of the Missouri River from the northern boundary of the 2900 acres as surveyed by Barrett in 1967. . .

The course of the Northerly High Bank is described as follows: The Iowa Northerly High Bank runs southeasterly through SE² of Section 13, T. 84 N., R. 47 W. and continuing through the NE⁴ of Section 24, T. 84 N., R. 47 W., then easterly through the NW⁴ and the N²NE⁴ of Section 19, T. 84 N., R. 46 W., thence southerly approximately 2,000 feet through the E²NE⁴ of Section 29, T. 84 N., R. 46 W., terminating at the point of intersection of the Iowa Easterly High Bank. . . .

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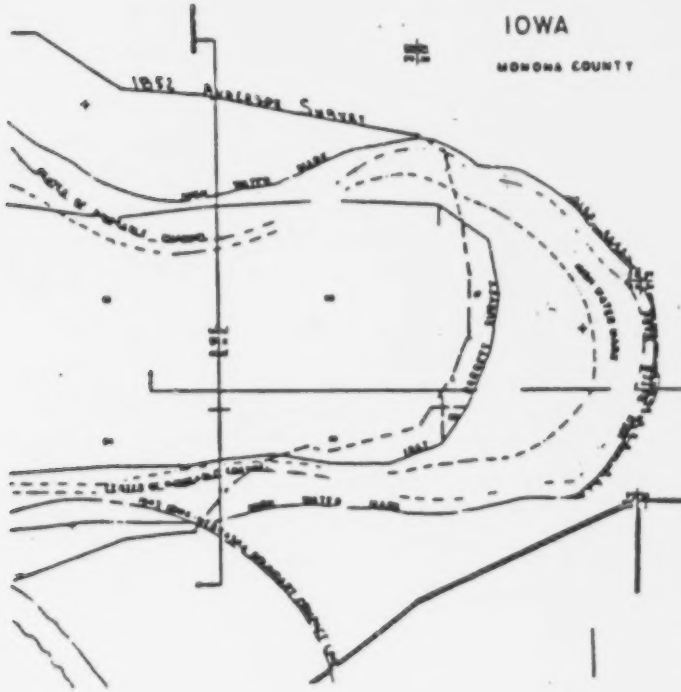


PLATE I.

Sketch of river's position in approximately 1875
 showing 1852 Anderson and 1867 Barrett Survey meander lines.

[See following illustration.]

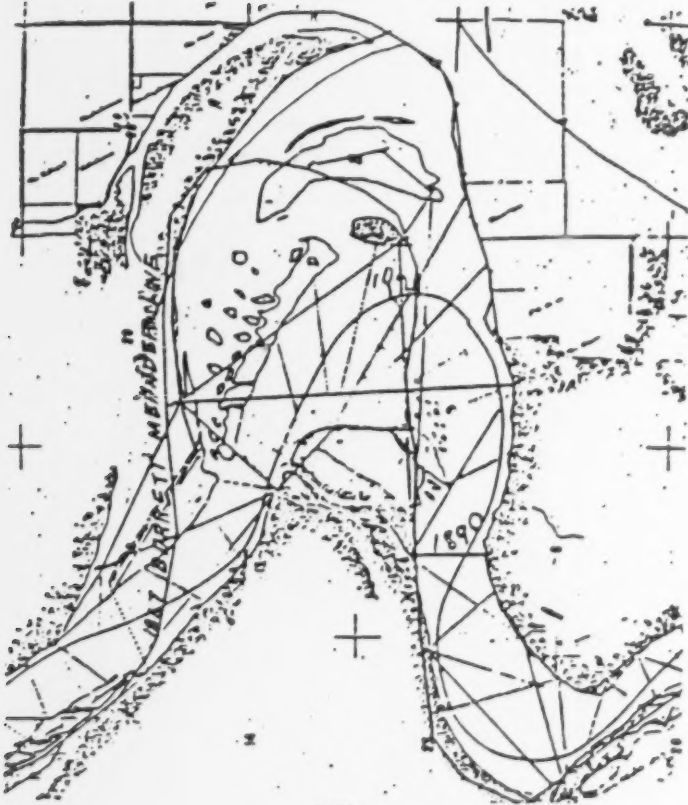


PLATE II.

1879 Missouri River Commission survey map.

[See following illustration.]

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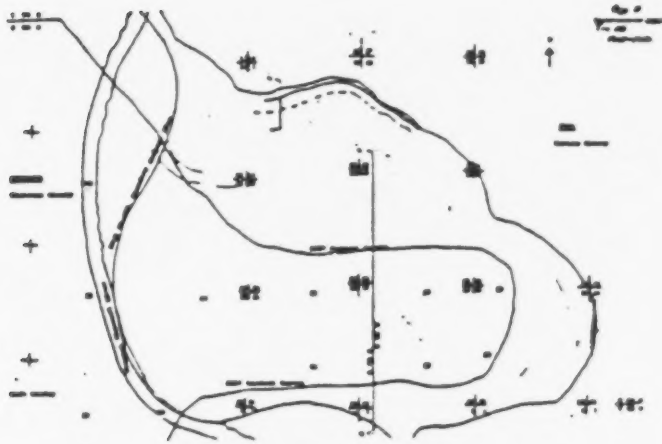


PLATE III.

Sketch of river against the northerly high bank.

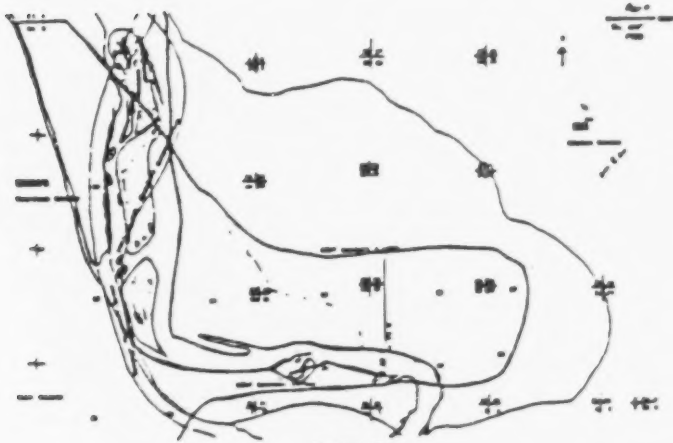


PLATE IV.

1923 Corps of Engineers map.

III. *Choice of Law.*

At trial the Tribe and the government asserted that federal law should control while the defendants contended that Iowa law should have been applied. The district court, however, applied Nebraska law in evaluating the facts of the case. On appeal the Tribe and the government renew their assertion that federal law should be applied in the resolution of this case. We hold that the governing principles of federal law vary significantly with the trial court's construction of state law and that the court erred in failing to apply that federal law.

A. *Interstate Boundaries.*

In *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), the Supreme Court reaffirmed the basic rule that the laws of the several states determine the ownership of the banks and shores of waterways. *Id.* at 378-79, 97 S.Ct. 582. However, the Court recognized an important caveat to this rule:

If a navigable stream is an interstate boundary, this Court, in the exercise of its original jurisdiction over suits between States, has necessarily developed a body of federal common law to determine the effect of a change in the bed of the stream on the boundary.

Id. at 375, 97 S.Ct. at 589.¹¹

As the Supreme Court noted in *Arkansas v. Tennessee*, 246 U.S. 158, 176, 38 S.Ct. 301, 306, 62 L.Ed. 638 (1918):

[T]hese dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

¹¹ See also *Illinois v. City of Milwaukee*, 406 U.S. 91, 105-06, 82 S.Ct. 1385, 31 L.Ed.2d 712 (1972); *Arkansas v. Texas*, 346 U.S. 368, 372-73, 74 S.Ct. 109, 98 L.Ed. 80 (1953) (Jackson J., dissenting); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, 58 S.Ct. 803, 82 L.Ed. 1202 (1938); Note, *The Federal Common Law*, 82 Harv.L.Rev. 1512, 1520 (1969).

Cf. St. Louis v. Rutz, 138 U.S. 226, 250, 11 S.Ct. 337, 34 L.Ed. 941 (1891).

Federal common law is applicable even where only a single state is involved in a controversy with a private party, see *Cissna v. Tennessee*, 246 U.S. 289, 38 S.Ct. 306, 62 L.Ed. 720 (1918), or where only private parties are involved, see *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 58 S.Ct. 803, 82 L.Ed. 1202 (1938), *Committee for Consideration of Jones Falls Sewage System v. Train*, 539 F.2d 1006, 1009 n. 8 (4th Cir. 1976); *Port of Portland v. An Island In Columbia River*, 479 F.2d 549 (9th Cir. 1973); *Sherrill v. McShan*, 356 F.2d 607 (9th Cir. 1966); *Iselin v. La Coste*, 139 F.2d 887 (5th Cir.), *cert. denied*, 321 U.S. 790, 64 S.Ct. 791, 88 L.Ed. 1080 (1944), as long as the interests of more than one state are sufficiently implicated in the potential outcome. The rendering of a decision in a private dispute which would "press back" an interstate boundary sufficiently implicates the interests of the states to require the application of federal common law.

In this case any claim that the reservation's eastern boundary had changed would of necessity have concerned the interstate boundary between Iowa and Nebraska, at least until 1943, thereby invoking federal law since both boundaries were located at the thalweg of the Missouri River. However, in 1943 Iowa and Nebraska entered into a compact under which the boundary between the states was permanently established at the middle of the main channel of the Missouri River in essentially its position in 1943. Iowa-Nebraska Boundary Compact, Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306; 1943 Nebraska Laws ch. 130. Ratified by Congress in Act of July 12, 1943, 57 Stat. 494 (1943).¹² To apply the compact it is nevertheless necessary to establish

¹² The compact provided for the cession of land previously lying within the boundaries of one state to the state within which it was located following the establishment of the permanent boundary. Titles, mortgages, and other liens good in the ceding state must be recognized as valid in the receiving state, Iowa Code 1971, p. lxiv; 1943 Iowa Acts ch. 306.

§§ 2-3; 1943 Nebraska Laws ch. 130, §§ 2-3. See also *Nebraska v. Iowa*, 406 U.S. 117, 122, 92 S.Ct. 1379, 31 L.Ed.2d 733 (1972).

title good in one state or the other as of 1943. Iowa-Nebraska Boundary Compact § 3. Good title in a state prior to 1943 in turn depends upon the location of the thalweg of the Missouri River, a determination which would have been controlled by federal law. Thus, in this case, since the issue concerns who held good title to the land in question prior to 1943, federal law must be applied.

B. Indian Law.

An equally compelling reason for applying federal law is the special relationship between the United States and the Omaha Indian Tribe and the nature of the interest litigated. The trial court rejected this position under the authority of *Fotenelle v. Omaha Tribe of Nebraska*, 298 F. Supp. 855 (D. Neb. 1969), *aff'd*, 430 F.2d 143 (8th Cir. 1970), where the Nebraska federal district court applied Nebraska law in an accretion-avulsion dispute between the Omaha Indian Tribe and individual Indians who traced their title back through individual patents issued to their predecessors by the United States.¹³ Instead, the trial court, finding no federal regulatory program involved¹⁴ and no specific act of Congress which displaced state law, reasoned, citing *Herron v. Choctaw & Chickasaw Nations*, 228 F.2d 830 (10th Cir. 1956), and *Francis v. Francis*, 203 U.S. 233, 27 S.Ct.129, 51 L.Ed. 165 (1906), that local law governed title disputes between the Indian tribe and private claimants. 433 F.Supp. at 61.

It has long been held that the rights and incidents of ownership attaching to grants made by the United States of public lands bounded on streams or other bodies of water, navigable or non-navigable, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the land lies. The fact that a conveyance disposes of tribal lands of Indians under guardi-

¹³Although this court affirmed the district court, the issue of state vis-a-vis federal law was not discussed. This court cited only federal authorities relating to the accretion-avulsion issue.

¹⁴See generally *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 93 S.Ct. 2389, 37 L.Ed.2d 187 (1973).

anship does not alter the rule. See *Oklahoma v. Texas*, 258 U.S. 574, 595, 42 S.Ct. 406, 66 L.Ed. 771 (1922). The *Fontenelle* decision and the other cases cited by the trial court fall within this settled doctrine. In *Packer v. Bird*, 137 U.S. 661, 669, 11 S.Ct. 210, 212, 34 L.Ed. 819 (1891), the Court observed:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee.

The present dispute is not related to incidents or rights flowing from a conveyance of public land or related to a patent grant of Indian allotment lands. Instead, the direct challenge made by the Iowa landowners here affects the boundary line to the reservation land itself, as it was originally contained in the Barrett Survey and established by the Treaty of 1854. The claims asserted by the defendants attempt to extinguish the aboriginal rights of the Omaha Indian Tribe, guaranteed by treaty, in these lands.¹⁵ Here the Omaha Indian Tribe claims its right to occupy and possess the lands in question arises under federal law. Presumptively, at least, this right has never been extinguished. See discussion of 25 U.S.C. § 194 *infra*. Under the circumstances the Supreme Court's observation in *Oneida Indian Nation v. County of*

¹⁵In the early case of *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 356-57, 8 L.Ed. 483 (1832), Chief Justice observed:

From the commencement of our government, congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts ... manifestly consider the several Indian nations as distinct political communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

Oneida, 414 U.S. 661, 677, 94 S.Ct. 772, 782, 39 L.Ed.2d 73 (1974), is applicable here:

In the present case, however, the assertion of a federal controversy does not rest solely on the claim of a right to possession derived from a federal grant of title whose scope will be governed by state law. Rather, it rests on the not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory right to tribal lands, wholly apart from the application of state law principles which normally and separately protect a valid right of possession.

State law dealing with riparian rights cannot unilaterally extinguish or deprive Indians of their tribal lands. The land area involved in this appeal relates solely to the original reservation land. Therefore, germane here is the Supreme Court's statement in *Oneida* that: "There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.* at 674, 94 S.Ct. at 781.¹⁶ Riparian ownership rights have been

¹⁶The special concern for preserving Indian land in the Indians is evidenced in the immunity of trust lands from the traditional restrictions on recovering land such as statutes of limitation, laches, and adverse possession. As the Fourth Circuit Court of Appeals early observed:

The determinative fact is that the federal government has assumed towards them [the Eastern Band of Cherokee Indians] the same sort of guardianship that it exercises over other tribes of Indians, from which it results that their property becomes an instrumentality of that government for the accomplishment of a proper governmental purpose and may not be taken from them by contract, adverse possession, or otherwise, without its consent. Indeed, a statute of the United States expressly forbids the acquisition of lands of any Indian tribe by purchase, grant, lease or other conveyance, except by treaty or convention and subjects to penalty anyone not being employed under the authority of the United States who attempts to negotiate such treaty. R.S. § 2116. 25 U.S.C.A. § 177.

United States v. 7,405.3 Acres of Land, 97 F.2d 417, 422 (4th Cir. 1938) (citations omitted). See also *United States v. Candelaria*, 271 U.S. 432,

specifically held to be controlled by federal law where trust land is involved.

The nature and extent of riparian rights, if any, in the bed and banks of navigable waters is generally a matter of state law. This is a consequence of the rules that (1) the United States holds title to the bed and banks of navigable waters in trust for future states; and (2) upon admission of a state to the Union, the United States relinquishes to the state the ownership of the bed and banks of its navigable waters. The south half of Flathead Lake presents an exception. Title to the bed and banks of the south half of Flathead Lake below high water mark is held by the United States in trust for the Tribes. Thus, the basis for state determination of riparian rights is non-existent. State law, therefore, is not applicable.

Confederated Salish & Kootenai Tribes v. Namen, 380 F.Supp. 452, 461 (D.Mont.1974), *aff'd*, 534 F.2d 1376 (9th Cir.), *cert. denied*, 429 U.S. 929, 97 S.Ct. 336, 50 L.Ed.2d 300 (1976) (citation omitted).¹⁷

See also *United States v. Finch*, 548 F.2d 822, 832-33 (9th Cir. 1976), *vacated on other grounds*, 433 U.S. 676, 97 S.Ct. 2909, 53 L. Ed. 2d 1048 (1977). Cf. *Bauman v. Choctaw-Chickasaw Nations*, 333 F.2d 785, 787-89 (10th Cir. 1964), *cert. denied*, 379 U.S. 965, 85 S. Ct. 658, 13 L.Ed.2d 559 (1965).

Finding the land in dispute affects an interstate boundary at the time the controversial movements occurred, and because the Tribe's right asserted to Indian trust land arises

440-42, 46 S.Ct. 561, 70 L.Ed. 1023 (1926); *United States v. Minnesota*, 270 U.S. 181, 196, 46 S.Ct. 298, 70 L.Ed. 539 (1926); *United States v. Schwartz*, 460 F.2d 1365, 1371-72 (7th Cir. 1972); *United States v. Ahtanum Irrigation Dist.*, 236 F.2d 321 (9th Cir. 1956), *cert. denied*, 352 U.S. 988, 77 S.Ct. 386, 1 L.Ed.2d 367 (1957); *Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F.Supp. 780, 784-85 (D.Conn.1976).

¹⁷ See also *United States v. Forness*, 125 F.2d 928, 932 (2d Cir.), *cert. denied*, 316 U.S. 694, 62 S.Ct. 1293, 86 L.Ed. 1764 (1942); *Schaghticoke Tribe of Indians v. Kent School Corp.*, *supra* at 783-84; *Narragansett Tribe of Indians v. Southern Rhode Island Land Dev. Corp.*, 418 F.Supp. 798, 804 (D.R.I.1976).

under federal law, we hold that the governing law is federal law.

IV. *Burden of Proof.*

Section 194 of Title 25 of the United States Code¹⁸ provides:

Trial of right of property; burden of proof

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the *burden of proof* shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

(Emphasis added).

The trial court reasoned that application of the statute to accretion or avulsion cases would be "unreasonable and circuitous" and "inextricably entwined with the merits." The court's analysis was apparently based on the idea that to apply § 194 would require the court to presume that the land originally occupied by the Indians within the Barrett Survey is exactly the same land in place today. To do so, the court believed, would be to decide the merits and compel it to

¹⁸ The defendants question the constitutionality of 25 U.S.C. § 194. In discussing the validity of laws granting special treatment to Indians the Supreme Court emphasized in *Morton v. Mancari*, 417 U.S. 535, 554-55, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974), that:

On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. This unique legal status is of long standing and its sources are diverse. As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.

(Citations omitted).

See also *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-80, 86 S.Ct. 1634, 48 L.Ed.2d 96 (1976); *Fisher v. District Court*, 424 U.S. 382, 390-91, 96 S.Ct. 843, 47 L.Ed.2d 106 (1976). Cf. *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973); *Williams v. Lee*, 358 U.S. 217, 79 S.Ct. 269, 3 L.Ed.2d 251 (1959); *Simmons v. Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash 1965), *aff'd*, 384 U.S. 209, 86 S.Ct. 1459, 16 L.Ed.2d 480 (1966).

decide that the same land remained by reason of avulsive movements of the river. On the other hand, the court reasoned, if the land had washed away and new land had accreted to the Iowa riparian owners, the Indians had never "possessed" the new land and it would not be proper to apply the statute.

We reject this reasoning.

Application of § 194 is not a self-answering inquiry to the issues at hand.¹⁹ To hold otherwise, one must presume that the reservation land has in fact been destroyed. Furthermore, the trial court's reasoning would negate the application of the § 194 statutory burden upon a pleading that simply recites Indian land had been destroyed by the erosive action of a river. Thus, under the trial court's rationale a party making claim to Indian land could defeat the congressional mandate by mere allegation without proof. We cannot accept the proposition that congressional policy can be so easily thwarted.

It is undisputed that the 1854 treaty established the Tribe as the legal titleholder to the land area within the Barrett Survey lines. This historical fact shows "previous possession or ownership" and is sufficient to raise a presumption of title in the Tribe under the statute and to place the burden of proof on the defendants. Contrary to the trial court's statement, applying the statutory burden of proof in this case does not decide the merits of the case since the fundamental issue still remains: Was there an alteration in the original boundary by reason of the marked movement of the Missouri River in the time periods involved? The defendants must bear the burden of proof that the boundary has been changed.

¹⁹Two cases have cited § 194, *United States v. Sands*, 94 F.2d 156 (10th Cir. 1938), and *Felix v. Patrick*, 36 F. 457 (C.C.D.Neb. 1888), *aff'd* 145 U.S. 317, 12 S.Ct. 862, 36 L.Ed. 719 (1892), but neither case expounds upon the effect the section should be given.

The early Indian Non-Intercourse Acts provided special treatment to Indian nations as the frontier was being settled. Section 194 was one of many special protective measures included in the Acts. The legislative history of the Act of June 30, 1834, 4 Stat. 729 (1846), of which § 194 was a part, clearly evidences a protectionist policy with regard to Indians.²⁰

The time has been when conciliation was sought; but the time is now passed when the fear of Indian hostility should be a leading feature of our Indian intercourse. Our relation to them is now that of the strong to the weak, and demands at our hands a more liberal policy, as well directed to promote their welfare as our political interests.

H.R. Rep. No. 474, 23d Cong., 1st Sess. 10-11 (1834).

The practice of safeguarding Indians in special areas of legislation continues today. See, e.g., *DeCoteau v. District County Court*, 420 U.S. 425, 444, 95 S.Ct. 1082, 43 L.Ed2d 300 (1975); *Antoine v. Washington*, 420, U.S. 194, 199-200, 95 S.Ct. 944, 43 L.Ed.2d 129 (1975).

²⁰Section 22 of the 1834 Indian Non-Intercourse Act, Act of June 30, 1834, 4 Stat. 733, upon which 25 U.S.C. § 194 is based, is derived from a similar provision in an 1822 non-intercourse act. See Act of May 6, 1822, § 5.3 Stat. 683. A 1924 Attorney General's opinion uses § 194 as an example of a long established practice of safeguarding Indian rights.

From the beginning of its negotiations with the Indians, the Government has adopted the policy of giving them the benefit of the doubt as to the questions of fact or the construction of treaties and statutes relating to their welfare. An illustration of this is found in section 2126 of the Revised Statutes (Act of June 30, 1834, 4 Stat. 733) (25 U.S.C. § 194), which provides:

"In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of precious possession or ownership."

This practice of safeguarding the Indian has been continuously adhered to. Treaties have been considered, not according to their technical meaning, but in the sense in which they would be naturally understood by the Indians.

Defendants urge that notwithstanding the failure of the court to apply § 194, the court, after placing the burden of persuasion on the defendants to establish their counterclaim, found that the defendants had in fact proven by the preponderance of evidence their title in the property.²¹ Although the trial court observed that it felt no presumption²² aided

²¹Adoption of findings proposed by the successful litigant will be upheld where supported by substantial evidence and not otherwise clearly erroneous. However in the present case the entire opinion of the trial court relating to the evidence and findings of fact is essentially a memorandum written by the defendants. Under the circumstances we feel compelled to repeat the admonition of the United States Supreme Court in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-57, 84 S. Ct. 1044, 1047, 12 L.Ed.2d 12 (1964):

Those findings, though not the product of the workings of the district judge's mind, are formally his; they are not to be rejected out-of-hand, and they will stand if supported by evidence. Those drawn with the insight of a disinterested mind are, however, more helpful to the appellate court. Moreover these detailed findings were "mechanically adopted," to use the phrase of the late Judge Frank in *United States v. Forness*, 125 F.2d 928, 942, and do not reveal the discerning line for decision of the basic issue in the case.

(Emphasis added)(citations omitted)(footnote omitted).

²²Under Iowa law there is a common law presumption in favor of a finding of accretion. *Kitteridge v. Ritter*, 172 Iowa 55, 151 N.W. 1097 (1915). No such presumption exists under Nebraska law. See *Jones v. Schmidt*, 170 Neb. 351, 102 N.W.2d 640 (1960). Whether a presumption of accretion exists under federal law is uncertain; Mr. Justice Douglas alludes to such a presumption in his dissent in *Mississippi v. Arkansas*, 415 U.S. 289, 295-96, 94 S.Ct. 1046, 39 L.Ed.2d 333 (1974) (Douglas J. dissenting). Cf. *Nebraska v. Iowa*, 143 U.S. 359, 369, 12 S. Ct. 396, 36 L.Ed. 186 (1882).

The existence of a presumption of accretion, however, does not affect the outcome here. Under the Federal Rules of Evidence a presumption loses its vitality once sufficient evidence on a disputed issue has been presented to permit a fact finder to act upon it. See Fed. R. Evid. 301; Louisell, *Construing Rule 301: Instructing the Jury on Presumptions in Civil Actions and Proceedings*, 63 Va. L. Rev. 281, 285 (1977); *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713 (6th Cir.) cert. denied, 423 U.S. 987, 96 S.Ct. 395, 46 L.Ed.2d 303 (1975); I. J. Weinstein & M. Berger, *Weinstein's Evidence* § 301(02), at 301-28 (1976); McCormick's *Handbook of the Law of Evidence* Ch. 36, § 345 (2d ed. E. Cleary ed. 1972). The Tribe having presented substantial conflictig evidence on the issue of accretion, any presumption of accretion disappeared and had no futher effect on their case.

The presumption of accretion, which affects only the burden of going forward with evidence, should not be confused with the burden

either party, the defendants' reasoning, as adopted by the trial court, erroneously focuses on the failure of the Tribe to carry a burden of proof to establish title to the land. In discussing the factual evidence, the court's opinion focuses almost entirely on the the inability of the Tribe to prove that the movement of the thalweg was brought about by avulsion.²³

We find that the trial court improperly placed the burden of proof on the Indians in the instant case. Title to the Blackbird Bend area as depicted by the Barrett Survey was presumptively shown to be in the Tribe and therefore, notwithstanding the subsequent movement of the thalweg of the Missouri River, the non-Indian claimants were required to assume the burden of proof to show that the Indians no longer had lawful title to the reservation land in question.

We now proceed to an examination of the governing principles of law.

V. *Law of Accretion and Avulsion.*

It is fundamental that:

[W]here running streams are the boundaries between States, the same rule applies as between private proprie-

of proof, that is the risk of nonpersuasion, found in § 194. As Professor Fleming James noted;

The term "burden of proof" is used in our law to refer to two separate and quite different concepts. . . . The two distinct concepts may be referred to as (1) the risk of non-persuasion, or the burden of persuasion or simply persuasion burden; (2) the duty of producing evidence, the burden of going forward with the evidence, or simply the production burden or the burden of evidence.

James, *Burdens of Proof*, 47 Va. L. Rev. 51 (1961).

Section 194 is designed to allocate the burden of persuasion and not merely to affect the burden of going forward with the evidence.

²³ The court observed in its opinion that:

The plaintiffs failed to sustain their burden of proving that any sudden change of the Missouri River channel occurred in the Blackbird Bend area detaching a block of Omaha Indian Reservation land from the Nebraska bank to the Iowa bank, which land was capable of identification as such, either during the period from 1867 to 1879, 1906 to 1923, as contended by the plaintiffs, or at any other time material herein.

tors, namely, that when the bed and channel are changed by the natural and gradual processes known as erosion and accretion, the boundary follows the varying course of the stream. . . .

Arkansas v. Tennessee, 246 U.S. 158, 173, 38 S.Ct. 301, 305, 62 L.Ed. 638 (1918).

See also *Missouri v. Nebraska*, 196 U.S. 23, 34-35, 25 S.Ct., 155, 49 L.Ed. 372 (1904); *Nebraska v. Iowa*, 143 U.S. at 360-61, 12 S.Ct. 396; *Mayor, Aldermen & Inhabitants of New Orleans v. United States*, 35 U.S. (10 Pet.) 662, 9 L.Ed. 573 (1836). Equally well settled is the proposition that

[i]f the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one, by the process known as an avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel.

Arkansas v. Tennessee, *supra*, 246 U.S. at 173, 38 S.Ct. at 304.

See also *Missouri v. Nebraska*, *supra*, 196 U.S. at 35, 25 S.Ct. 155; *Nebraska v. Iowa*, 143 U.S. at 361, 12 S.Ct. 396.

The trial court found that the eastern boundary of the Omaha Indian Reservation changed with the shifting river since the tribe had failed to show that the river had moved by avulsion. In reaching this result the trial court ruled that an avulsion occurs only where a sudden shift in a channel cuts off land "so that after the shift it remains identifiable as land which existed before the change of the channel and which never became a part of the river bed." 433 F.Supp. at 73. In doing so, the trial court rejected the plaintiffs' theory that the doctrine of avulsion is equally applicable when a sudden and perceptible shift of the thalweg occurs within the bed of the stream or over as well as around land in place. The government's evidence was that such a perceptible shift might occur when the river goes out of its bed and the land is submerged by a flood or freshet. We find the district court

too narrowly focuses on identifiable land in place as the sole criterion of avulsion without giving proper weight to the plaintiffs' theory of their case and to the factual record presented.²⁴

The Supreme Court has defined accretion as "an addition to land coterminous with the water, which is formed so slowly that its progress cannot be perceived. . . ." *Jefferis v. East Omaha Land Co.*, 134 U.S. 178, 193, 10 S.Ct. 518, 522, 33 L.Ed. 872 (1890).²⁵ In contrast, avulsion has been said to occur in various ways. One observation is that it occurs where there is a "sudden change of the banks of a stream such as occurs when a river forms a new course by going through a bend, the sudden abandonment by a stream of its old channel and the creation of a new one, or a sudden washing from one of its banks of a considerable quantity of land and its deposit on the opposite bank."²⁶ III American Law of Property § 15.26, at 855-56 (1952) (footnotes omitted).

²⁴ The actual trial lasted over one month; the trial record constitutes 3,216 pages and includes over 150 exhibits.

²⁵ The rule of accretion, which found its origins in Justinian's Institutes—

Moreover, that ground which a river hath added to your estate by alluvion, becomes your own by the law of nations. And that is said to be *alluvion*, which is added so gradually, that no one can judge how much is added at each moment of time.

T. Cooper, *The Institutes of Justinian*, Lib. 11, Tit. 1, § 20 (3d ed. 1852)—was based on the proposition that the "imperceptible nature of the acquisition" is "too minute and valueless to appear worthy of legal dispute or separate ownership." Hall, *Rights of the Crown in the Sea-Shore*, in S. Moore, *A History of the Foreshore* 793 (1888). See also I.G. Baker, Halleck's International Law ch. VI, at § 25 (1908); 8 Op.Att'y Gen. 175, 177-78 (1856). Imperceptibility, in the sense that "though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on." *St. Clair v. Lovington*, 90 U.S. (23 Wall.) 46, 68, 23 L.Ed. 59 (1874), is the accepted test for accretion today. See, e.g., *Littlefield v. Nelson*, 246 F.2d 956, 958 (10th Cir. 1957); *United States v. Commodore Club, Inc.*, 418 F.Supp. 311, 322 (E.D.Mich.1976); *Schafer v. Schnabel*, 494 P.2d 802, 807 n. 19 (Alaska 1972).

²⁶ Justinian described avulsion as follows:

But, if the impetuosity of a river should sever a part of your estate, and adjoin it to that of your neighbour, it is certain, such part would still continue yours. . . .

The Institutes, *supra* § 21.

A clear distinction between accretion and the sudden and perceptible movement associated with avulsion is, however, often obscured when applied to the actual movement of uncontrolled rivers. The Supreme Court emphasized the unpredictability of the Missouri River in *Nebraska v. Iowa*, 406 U.S.117, 119, 92 S.Ct. 1379, 1381, 31 L.Ed.2d 733 (1972):

[E]xperience showed that "the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1922]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'that of avulsion.'" Eriksson, *Boundaries of Iowa*, 25 *Iowa J. of Hist. and Pol.* 163, 234 (1927).²⁷

The early decision in *St. Louis v. Rutz*, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941 (1891), illustrates an attempt at more closely defining avulsion in light of actual river conditions. The Court found that violent erosion of shoreland along the Mississippi River between 1865 and 1875 was avulsive in nature, sustaining findings that "the caving in and washing away of the same was rapid and perceptible . . . [occurring]

²⁷ The early movements of the Missouri River were described as "remarkably impetuous," flooding being common on the river.

The regular floods are two in number, and usually occur in April and in June. The first is extremely violent and of short duration, rarely lasting over a week or ten days; it seems to come largely from the upper river. The June rise, although generally higher, is of longer duration, being influenced by local rains and the general saturation of the soil. . . . The April rise is generally the most destructive, for it shows, for a time at least, a tendency to follow the channels developed during the low water season preceding, and, as a consequence, the banks are attacked with extreme violence. . . . Both, however, have sufficient power to produce tremendous effects and bring about the most astonishing changes.

Preliminary Report Upon the Improvement of the Navigation of the Missouri River, in *Annual Report of the Chief of Engineers* app. S, at 1651 (1881).

principally at the spring rises or floods of high water in the Mississippi . . ." *Id.* at 231, 11 S.Ct. at 339.²⁸

Rapidity of erosion as the determinative factor in a finding of avulsion was, however, rejected in early dicta in *Nebraska v. Iowa*, 143 U.S. 359, 12 S.Ct. 396, 36 L.Ed. 186 (1892). See also *Oklahoma v. Texas*, 260 U.S. 606, 43 S.Ct. 221, 67 L.Ed. 428 (1923) (where the Court applied the rule of accretion, following *Nebraska v. Iowa*, to the Red River); *Philadelphia Co. v. Stimson*, 223 U.S. 605, 32 S.Ct. 340, 56 L.Ed. 570 (1912). Although the litigated facts of *Nebraska v. Iowa* appear to have dealt only with the movement of the Missouri River cutting across the neck of a U-shaped land formation commonly known as an ox-bow,²⁹ the Court expressed its view that the rapidity of the process of subtraction or addition did not prevent application of the rule of accretion.

In discussing the rules of accretion and avulsion the Supreme Court quoted, among others, Vattel, an early civil law authority. Vattel's formulation of avulsion held that "when the violence of the stream separates a considerable

²⁸ The perceptible nature of the erosion along the bank was described as follows:

[D]uring each flood there was usually carried away a strip of land from off said river bank from two hundred and fifty to three hundred feet in width, which loss of land could be seen and perceived in its progress; that as much as a city block would be cut off and washed away in a day or two; that blocks or masses of earth from ten to fifteen feet in width frequently caved off and fell into the river and were carried away at one time. . . .

St. Louis v. Ruiz, 138 U.S. 226, 231, 11 S.Ct. 337, 339, 34 L.Ed. 941 (1891).

²⁹ The Court in its concluding paragraph relates:

It appears, however, from the testimony that in 1877 the river above Omaha, which had pursued a course in the nature of an ox-bow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the center line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel.

Nebraska v. Iowa, 143 U.S. at 370, 12 S.Ct. at 400.

part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner."³⁰ 143 U.S. at 366, 12 S.Ct. at 396.

It is obvious, however, when viewed in the context of the entire opinion, that the Court was not seeking to narrow the traditional scope of avulsion but merely to demonstrate that the rule of accretion, as traditionally defined, was equally applicable to the Missouri River. The Court, in defining avulsion, cited *Gould on Waters*, noting:

It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In *Gould on Waters*, sec. 159, it is said; "But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates." 2 Bl.Com. 262; *Angell on Water Courses*, § 60; *Trustees of Hopkins' Academy v. Dickinson*, 9 Cush. 544; *Buttenuth v. St. Louis Bridge Co.*, 123 Illinois 535 [17 N.E. 439]; *Hagan v. Campbell*, 8 Porter (Ala.) 9; *Murry v. Sermon*, 1 Hawks (8 N.C.) 56.

143 U.S. at 361, 12 S.Ct. at 397 (emphasis added).

³⁰ It is in this context that the Nebraska cases relied upon by the district court relate that one of the significant factors of avulsion is identifiable land in place. See *Conkey v. Knudsen*, 143 Neb. 5, 8 N.W. 2d 538 (1943), *vacating* 141 Neb. 517, 4 N.W.2d 290 (1942); *Independent Stock Farm v. Stevens*, 128 Neb. 619, 259 N.W. 647 (1935); *Iowa R.R. Land Co. v. Coulthard*, 96 Neb. 607, 148 N.W. 328 (1914). These and several other state cases—*Yuttermann v. Grier*, 112 Ark. 366, 166 S.W. 749, 751 (1914); *Longabaugh v. Johnson*, 321 N.E.2d 865, 867 (Ind. App. 1975); *Coulthard v. Stevens*, 84 Iowa 241, 50 N.W. 983, 984 (1892); *McCormick v. Miller*, 239 Mo. 463, 144 S.W. 101, 103 (1912); *Attorney General ex rel. Becker v. Bay Boom Wild Rice & Fur Farm*, 172 Wis. 363, 178 N.W. 569, 573 (1920)—which discuss identifiable land in place as one of the key factors in a finding of avulsion all ultimately rely on either *Nebraska v. Iowa* or a Missouri case, *Benson v. Morrow*, 61 Mo. 345 (1875).

After *Nebraska v. Iowa* only a few federal cases have addressed the scope of the avulsion rule in a context other than an ox-bow cutoff involving permanently emerged land in place.³¹ In *Veatch v. White*, 23 F.2d 69 (9th Cir. 1927), the facts revealed that:

Years ago, between 1859 and 1874, in the southern shore of Puget Island there was a slough running in a northwesterly direction from the Columbia river. The slough, although only used by fishing boats, had a channel that was shallow and more or less filled with snags. So much of the area of Puget Island as was separated from the mainland by this slough was called Coffee Island, *which gradually became submerged*. Some time before 1894 the water of the river began to bore out and enlarged the slough, and when freshet waters of 1894 came the slough was so enlarged that a channel formed, which after 1894 was used for navigation. After this new channel was created, shoals formed to some extent on the south, or Oregon, side of Coffee Island, and navigation on that side became unsafe for deep draft ships. . . .

Id. at 70 (*emphasis added*).

Relying on the definition of avulsion in *Nebraska v. Iowa*, the court held that:

[T]hough *by erosion* of Puget Island the river has widened and the center of the old channel has been changed somewhat, and has become more shallow than it was at the time of the fixing of the boundary of the state of Oregon, such changes are not to be confused with changes made by the creation of the slough channel, which was caused by sudden and known causes, not by accretion. The demarking line must therefore remain the center of the channel between Puget Island and Oregon before the avulsion.

³¹ The language and expressions in the *Nebraska v. Iowa* decision may, as the Supreme Court of Alabama remarked, "cause some confusion unless care is had in observing them." *Greenfield v. Powell*, 220 Ala. 690, 127 So. 171, 172-73 (1930). See also *Willett v. Miller*, 176 Okl. 278, 55 P.2d 90, 93-94 (1935).

Id. at 71 (emphasis added).

This court applied the same rationale in *Uhlhorn v. U.S. Gypsum Co.*, 366 F.2d 211 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026, 87 S.Ct. 753, 17 L.Ed.2d 674 (1967), where the end of a meander bend in the Mississippi River gradually became separated from the mainland area by a small channel. During a flood in 1938 the subsidiary channel was scoured out making it the main navigational channel following the flood. Relying upon *Nebraska v. Iowa*, this court, through Judges Vogel, Van Oosterhout and Mehaffy, held that, despite the fact that the bar separating the old and new channel was as much as four feet under water when the change occurred, the change was avulsive.³²

Id. at 219-20. The court observed:

In most instances where a river changes by avulsive processes, it has left intervening land above high water mark, but we do not think the elevation of the land mass between an old channel and a new one that is cut by avulsive processes is a decisive criterion for a change in a state boundary. By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in *State of Arkansas v. State of Tennessee*, *supra*, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that *State of Arkansas v. State of Tennessee*, *supra*, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

Id. at 219 (emphasis added).

Several state cases have similarly recognized that the sudden, perceptible change of the channel, whether within or

³² Several other decisions have also recognized that the submergence of land around or over which a channel shifts does not prevent a finding of avulsion. See e.g., *Widdicombe v. Rosemiller*, 118 F. 295, 299 (C.C.W.D.Mo. 1902); *Fowler v. Wood*, 73 Kan. 511, 85 P. 763, 768 (1906); *Nix v. Dickerson*, 81 Miss. 632, 33 So. 490 (1903). Cf. *Mulry v. Norton*, 100 N.Y. 424, 3 N.E. 581 (1885).

without the river's original bed, is a critical factor in defining an avulsion.³³

Our review of the foregoing authorities leads us to conclude that, although evidence of identifiable land in place may have some probative value that erosion has not occurred, the fact that intervening land may not be visible at the time a sudden flood or freshet occurs is not conclusive in itself.³⁴

³³In *Eaton v. Francis*, 484 P.2d 128, 131 (Colo. App. 1971), the court held that:

According to the trial court's findings, which were based upon sufficient evidence and are therefore binding upon appeal, the Arkansas River moved from its old location to its new one as result of the great flood in 1921. To gain by accretion, it is necessary to show a slow imperceptible shifting of the river's course over a long period of time. A sudden violent shift or avulsion, as the court found occurred here, does not shift the boundaries of the lot to conform to the new banks of the river. Rather the lots remain the same, that is, bounded upon the old bank of the river not the new.

(Citations) omitted).

See also *City of Lawrence v. McGrew*, 211 Kan. 842, 508 P.2d 930, 932 (1973); *Wood v. McAlpine*, 85 Kan. 657, 118 P. 1060 (1911); *Fowler v. Wood*, 73 Kan 511, 85 P. 763 (1906); *Sharp v. Learned*, 195 Miss. 201, 14 So.2d 218, 220 (1943); *Bode v. Rollwitz*, 60 Mont. 481, 199 P. 688 (1921); *Nolte v. Sturgeon*, 376 P.2d 616, 619-21 (Okla.1962); *Buchheit v. Glasco*, 361 P.2d 838, 841 (Okla.1961); *Harper v. Holston*, 118 Wash. 436, 205 P. 1062, 1064 (1922). Cf. *Coastal Indus. Water Auth. v. York*, 532 S. W.2d 949, 952 (Tex.1976); *Jourdan v. Abbott Constr. Co.*, 464 P.2d 311, 314 n 3 (Wyo.1970).

³⁴Both state and federal case law also recognize an exception to the accretion rule where a stream moves gradually around or jumps across a land area, thereby markedly altering the river's channel. The rule in these cases, sometimes known as "the island rule," has not been confined to islands. In *Davis v. Anderson-Tully Co.*, 252 F. 681, 685 (8th Cir. 1918), the court applied the principle to a peninsula and observed:

To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, *not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course*, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel

To reason otherwise would be to limit the rule to the rare situation involving only an *obvious* neck cut-off where intervening land is not submerged. The history of the rule, the case law developed under it, and the policy underlying the doctrine all support a broader application.³⁵

In *Bonelli Cattle Co. v. Arizona*, 414 U.S. 313, 327, 94 S.Ct. 517, 38 L.Ed.2d 526 (1973), *overruled on other grounds*, *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel*

became the main channel of navigation.

(Emphasis added).

See also *Washington v. Oregon*, 211 U.S. 127, 134-36, 29 S.Ct. 47, 53 L.Ed. 118 (1908); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 403-11, 20 L.Ed. 116 (1870); *Commissioners of Land Office v. United States*, 270 F. 110, 113-14 (8th Cir. 1920), *appeal dismissed*, 260 U.S. 753, 43 S.Ct. 14, 67 L.Ed. 497 (1922); *State v. Ecklund*, 147 Neb. 508, 23 N.W.2d 782, 789-90 (1946).

³⁵ One author has noted that changes or movements of rivers may be divided into three basic categories: (1) gradual changes *in the river* caused by erosion and accretion; (2) sudden changes *in the river* caused by erosion and avulsion without cutting a new bed; and (3) where the river itself cuts a new bed. In discussing these changes, Professor Bouchez explored the policy rules behind boundary river principles:

When an alteration in the boundary river has been caused by a gradual process of erosion and accretion, the best solution is the adjustment of the boundary to the changed situation. Such a procedure will mean that the functional meaning of the thalweg boundary will be maintained. In addition the damage caused to one of the States by slight alterations will generally be of minor importance. Damage arising from slight alterations will not continuously affect in the long run only one of the riparian States.

The second category of alterations is a more difficult problem. Maintenance of the boundary as it existed before the alteration of the Thalweg will abolish the functional meaning of the thalweg boundary. If, on the other hand, the boundary follows the new thalweg serious damage may be caused to one of the riparian States. An example of such a situation is the Chamizal tract. The interests of the State put at a disadvantage by the instantaneous alterations of the thalweg must be considered as the dominant factors in order to find an equitable solution.

If the injured State is primarily interested in navigation the new thalweg is perhaps the best boundary. If the area, which has been partly destroyed or seriously damaged by the alterations of the thalweg, is of vital importance for a State, the maintenance of the old boundary is to be preferred.

Bouchez, *The Fixing of Boundaries in International Boundary Rivers*, 12 Int'l & Comp.L.Q. 789, 808 (1963).

Co., 429 U.S. 363, 97 S.Ct. 582, 50 L.Ed.2d 550 (1977), the Supreme Court explained:

The rationale for the doctrine of avulsion is a need to mitigate the hardship that a shift in title caused by a sudden movement of the river would cause the abutting landowners were the accretion principle to be applied.³⁶

Undisputed historical data relating to the early movements of the Missouri River make clear that the wild and uncontrolled movements of the river did not occur with mathematical precision or follow predictable paths. In fact, as the voluminous testimony and documentary evidence presented by both sides reveal, accretion and avulsion are interrelated phenomena often occurring together and in fact often acting as the motivating force for each other. Erosion and accretion, for example, may change the angle at which a river attacks a downstream bank, increasing the likelihood of an avulsive cut-through. Erosion may narrow the neck of a meander bend producing the necessary conditions for an oxbow cut-off. Or, as the government asserts, an avulsion can produce river characteristics such as low river current energy areas which are favorable to rapid deposition.

When weighed with the significant policy considerations involved, we hold that, under governing principles, the critical determinant of avulsion is a sudden perceptible shift of the

³⁶The statement in *Bonelli* followed from earlier authorities which similarly emphasized the inequities that would arise were the rule of avulsion not available.

[i]f the change does not come within the definition of gradual and imperceptible, but the land is rapidly washed away on one side and formed on the other, the fiction should give way to the fact, and the owner should not lose title to his property. The title to the land itself is of more importance than the riparian right of access to the water or convenience of having a natural, rather than a mathematical, boundary; and rules which were made for convenience should not be permitted to wrest the title to land from its true owner.

3 Farnham on Waters § 848, quoted in *Fowler v. Wood*, 73 Kan. 511, 525, 85 P. 763, 768 (1906).

channel.³⁷ Only where the thalweg gradually moves through the intervening land as a direct consequence of erosion *and* the imperceptible process of accretion to the forming bank do the policies underlying the accretion and avulsion rules justify altering permanent land boundaries to conform with the gradually changing thalweg.

In the present case the plaintiffs claim that a sudden and unusual jump in the thalweg within the bed of a stream or over, as well as around, land (submerged or not) invokes the doctrine of avulsion and its corollary rule that the boundary does not change with the shift of the thalweg. The trial court in rejecting this theory held that a sudden and unusual (erratic) jump or movement of the thalweg without evidence of identifiable land in place falls within the historical rule of accretion. We find this ruling inconsistent with settled principles governing the rule of accretion and the broader parameters involving the doctrine of avulsion. We therefore conclude that it was error for the trial court to reject the plaintiff's legal theory in its evaluation of the evidence.

We now turn to the factual findings of the district court.

³⁷ Another form of avulsion, of course, is recognized in the highly unusual case where identifiable land is visibly torn from one bank and carried downstream to a resting place. The Supreme Court, however, in *Nebraska v. Iowa*, noted that this type of avulsion could not occur on the Missouri River.

No engineering skill is sufficient to say where the earth in the bank washed away and disintegrating into the river finds its rest and abiding place. The falling bank has passed into the floating mass of earth and water, and the particles of earth may rest one or fifty miles below, and upon either shore.

143 U.S. at 369, 12 S.Ct. at 399.

Cf. St. Louis v. Rutz, 138 U.S. at 249-51, 11 S.Ct.337.

VI. *The 1875-1879 Movement of the Thalweg.*

The basic finding essential to the defendants' case is the trial court's statement that "the original Omaha Indian reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition within the Black-bird Bend area" 433 F.Supp. at 88. In reviewing this finding our task is not made easier by the district court's verbatim adoption of the defendants' analysis of the evidence and proposed findings of fact including the defendants' credibility assessments of the witnesses.³⁸ We hold the trial court's conclusion to be clearly erroneous and not supported by substantial evidence.

The defendants' proof, and the trial court's conclusion that erosion and accretion produced the movement in the river between 1875 and 1879, rest essentially upon six factual premises. First, defendants assert that bar A (see Plate II) must have been of recent origin (not land in place) since it was situated in the area formerly occupied by the old channel and because willows were the only vegetation growing on the bar. Thus, they contend that the river must have eroded the meander lobe and through the process of accretion deposited the crescent shaped sand bar depicted as bar A during its westward movement. The defendants next point to expert testimony that the remnant channel between bar A and the easterly high bank is a "common phenomenon" associated with erosion and accretion. Such channels are produced, they assert, when a river gradually moves away from its

³⁸ The trial court did, however, express a caveat near the end of its opinion that "certain findings of fact, even if agreed upon, would not lead in the minds of all parties concerned to a definite legal conclusion: *i. e.* that either an avulsion or an accretion took place at key times in history at particular places on the Missouri River." 433 F.Supp. at 89. The district court nonetheless concluded that it was "convinced that one particular set of conclusions can be squared with the evidence far better than other proposed conclusions." *Id.* Notwithstanding its rejection of the Tribe's or the government's broader approach to the doctrine of avulsion, the court conceded that it was "apparent that the movements of the Missouri River have not been so clean and precise that they easily fall into the legal categories conveyed by the terms 'accretion' and 'avulsion.'" *Id.*

previous channel by the process of erosion and accretion. The accretive deposition then closes the old channel at its upper end forming the remnant channel. Third, defendants' experts assert that bars B and D shown on the 1879 map could not have been identifiable land in place since they were barren of vegetation. Instead, they suggest that the bars were middle sand bars formed behind the southerly and westerly migration of the river. Defendants further contend that since no cottonwood trees, which grow only on land that is stabilized and not subject to frequent inundation, were shown to be growing on bar C, the bar must have been completely eroded away as the river moved. Defendants also find support for their accretion theory in the opinion of one of their experts that the parallel positioning of bars A, B, C and D was consistent with a gradual southwesterly movement of the river as a result of erosion of the meander lobe. Finally, the defendants introduced the experiments of Captain J. F. Friedkin³⁹ into evidence which, along with hydrologic experience, allegedly showed "that during high water flows, the river will flow and erode against the upper side of a point bar" ⁴⁰

The court concluded on the basis of this evidence that the meander lobe was eroded away as the channel moved over the area where the lobe had existed. Thus, the court ruled that the shift in the course of the river was a consequence of progressive scour and deposition, that is by accretion. 433 F.Supp. at 77-78.

Our analysis of the record leads us to conclude that the evidence presented at trial as a matter of law was insufficient

³⁹ Captain J. F. Friedkin of the United States Corps of Engineers from 1942 through 1944 conducted one of the pioneering studies of river hydrology.

⁴⁰ Defendants' expert witness, George R. Hallberg, Chief of the Research Division of the Iowa Geological Survey, testified that every meander bend has a maximum width. Once the river reaches the maximum width it becomes more efficient for it to flow over the inside of the bend, and erode across the point bar, thereby decreasing the width of the bend. This process occurs at constant discharge rates, and accelerates at high discharge. Hallberg theorized that some time between 1867 and 1875 Blackbird Bend reached its maximum width and the thalweg began flowing against the meander lobe.

to satisfy the defendants' burden of proving by the preponderance of the evidence that erosion and accretion were responsible for the significant shifts of the river between 1875 and 1879.

A. Identifiable Land in Place.

The years from 1875 through 1879 were years of extremely high water flow on the Missouri River; no other four year period equaled or exceeded the maximum discharge for those years.⁴¹ Defendants' experts agreed that during this time the meander lobe was low, at times entirely under the surface of the moving river and extremely vulnerable. This is corroborated by Barrett, who in his 1867 survey described the eastern end of the meander lobe as a low sandy point.

Recognizing that identifiable land in place may in given circumstances have probative value in helping to distinguish between accretion and avulsion, that is, at least in the sense of determining whether intervening land has been completely eroded or not, little significance can be attached to its alleged absence under the evidence adduced in the present case. The defendants urge that absence of identifiable land in place provides the necessary inference of erosion of the original reservation land. However, the trial court's finding that in 1879 bar A was of recent origin and was not identifiable land in place does not afford a permissible inference that the original reservation land had been eroded since, as the trial court itself pointed out, at least part of bar A was located within the area of the old abandoned channel. No land could be eroded if it never existed in the first place. Under the circumstances it is obvious that bar A is nothing more than land formed by deposition after the channel was abandoned.

The evidence that bar D and part of bar B, lying to the west of bar A, and inside the Barrett Survey lines, were not identifiable land in place is equally inconclusive. It is conceded that the eastern end of the Barrett Survey was made

⁴¹ In 1875 there was a discharge of 140,000 cubic feet per second. In the next four years, the maximum discharges recorded were 300,000, 200,000, 215,000 and 220,000 cubic feet per second.

up of sandy material. Thus, even if the river changed by avulsive movements through the end of the meander lobe, the land remaining in place would have been low and composed of sand.⁴²

The trial court also found that the land which had previously occupied the area shown as bar C on the 1879 map had been completely eroded away and that bar C had formed thereafter as a middle bar as the thalweg moved to the west. The court observed: "If bar 'C' were land-in-place which had existed prior to 1879, it would have supported the growth of cottonwoods or other vegetation more substantial than willows by 1890."⁴³ 433 F.Supp. at 77. Although it is possible that the land represented by bar C may have completely eroded, it is entirely speculative to say that that is what occurred. The record also supports the possibility that bar C, located on the eastern end of the lobe, was the same surface area described by Barrett in his notes and was not built up by accretive deposits. The record is insufficient to prove what actually occurred.

Under defendants' accretion theory bar C would of necessity have been comprised of relatively newly deposited soil since it was located close to the 1879 position of the thalweg. Nevertheless, the record shows that willows were growing on bar C in 1879 indicating, as Dr. McQuivey, a government witness, theorized, that the bar may well have

⁴² Barrett described the area in 1867 as follows:

Fractional Township 24 N.R. 11 East, the 6th Principal Meridian, is a low, sandy point, subject to frequent inundations from the Missouri River.

Except a few small cottonwood trees and some willows, there is almost no vegetation upon it.

The Missouri River is constantly changing its banks, so that no permanent corners can be established near the water, indeed, except where there are bearing trees, none of the corners in this Township will probably remain longer than the first high freshet in the Missouri.

Small quantities of coal were deposited in the several mounds as per instructions, but the sandy soil will not prevent it from being washed away.

⁴³ The 1890 reference is confusing and in obvious error. The area where bar C was located in 1879 is depicted on the 1890 map as "cleared" land.

been land in place.⁴⁴ The fact that cottonwoods were not also growing on the bar does not prove the contrary. Bar C, along with bars B and D, was located near the eastern end of the Barrett Survey which Barrett described as sandy soil and frequently inundated. Testimony in the record shows that cottonwoods did not thrive in areas subject to frequent inundation. We find the evidence concerning bar C to be highly conjectural and inconclusive as to whether it formed by accretion or was in fact identifiable land in place.

There exists another basic reason why we regard the evidence of the defendants as insubstantial. The opinion of the defendants' experts⁴⁵ that no identifiable land remained in place after the movement of the river sometime between 1875 and 1879 is essentially based upon inferences drawn from the 1879 map admittedly prepared in a 10-day period during the June rise of the Missouri River when the river was as much as five feet above its ordinary high water level. At the time the river was shown to be nearly 10,000 feet wide, whereas in 1875 the bed had been only approximately 800 feet across. Soundings taken at that time demonstrate that a substantial land area was immediately below the surface of

⁴⁴ The government urges that the vegetation appearing on bar C is inconsistent with the theory of accretion since, if the land had in fact been washed away, it would have been the last of the visible bars to have formed and the last to develop vegetation.

⁴⁵ Each of defendants' experts viewed the existence of identifiable land in place as an essential factor in defining avulsion. Raymond L. Huber, a supervisory civil engineer employed by the Corps of Engineers, stated that

avulsion is the transfer of the piece of land from one bank of the river to the other bank of the river, which occurs in such a manner that you can follow the movement of the transfer of land and identify it as the identical land which formerly existed on the other bank, beyond any power of question.

John F. Kennedy, a professor in the Division of Energy Engineering at the University of Iowa, and director of the Iowa Institute of Hydrologic Research, a division of the University of Iowa College of Engineering, defined avulsion as "the river shifting from one side of a block of land to the other leaving the intervening land undisturbed in the process." Finally, Dr. George R. Hallberg testified that:

Avulsion is a term I don't use technically. But from much of my work, what I understand, avulsion to mean is a very sudden perceptible movement which would cut off and abandon a river and leave the land contained by that old channel essentially intact.

the flood water. The defendants do not contend that the river bed permanently expanded to 10,000 feet as shown in 1879; it obviously would be much narrower upon subsidence. See e.g., the 1890 Missouri River Commission Map, set out as Plate V, *infra* in which the river is shown to be no more than 3,500 feet wide. The existence or nonexistence of identifiable land in place could not have been accurately assessed at a time when the river's flow was abnormally high during floods which completely inundated the adjacent land. Thus, any inferences drawn from the alleged land forms exhibited on the 1879 map appear to be highly conjectural. Substantial evidence cannot be based upon an inference drawn from facts which are uncertain or speculative and which raise only a conjecture or possibility.⁴⁶ See *Polk v. Ford Motor Co.*, 529 F.2d 259, 271 (8th Cir.), cert. denied, 426 U.S. 907, 96 S.Ct. 2229, 48 L.Ed.2d 832 (1976); *Wilson v. Volkswagen of America, Inc.*, 561 F.2d 494, 517 n. 65 (4th Cir. 1977); *Padgett v. Buxton-Smith Mercantile Co.*, 262 F.2d 89, 41 (10th Cir. 1958); *Gilbert v. Gulf Oil Corp.*, 175 F.2d 705, 709 (4th Cir. 1949).⁴⁷ As this court indicated in *Uhlhorn v. U.S. Gypsum*

⁴⁶ Wigmore in his treatise on evidence notes that while one inference may properly be built on another inference. J. Wigmore, *Evidence* § 41(3d ed. 1940), there is a limit to proof offered in this manner. As an example of the correct method of treating inferences Wigmore quotes from the case of *New York Life Ins. Co. v. McNeely*, 52 Ariz. 181, 79 p.2d 948 (1938), in which the court observed:

"It is true, of course, that in everyday life, all men frequently act as the result of the repeated piling of inferences upon inferences, and, as a matter of strict logic, if an inference has any probative value whatever in aiding one to determine the ultimate question of fact, it should be considered. The principle which is applied by the average man in his own private affairs usually is that no matter how many inferences are piled on each other, it is only necessary that each successive inference should be more probable than any other which might be drawn under all the circumstances. The Courts, however, have always insisted that the life, liberty and property of a citizen should not be taken away on possibilities, conjectures, or even, generally speaking, a bare probability." J. Wigmore, *supra* §41, at 439.

⁴⁷ *Cf. Logsdon v. Baker*, 170 U.S.App.D.C. 360, 361, 517 F.2d 174, 175 (1975), where the court held that reliance on "brake marks" purported to be visible in photographs but which could not be discerned by the district judge or the appeals court was held to be an inadequate basis for an expert opinion on the cause of an accident since the expert's opinion would be "too speculative."

Co., 366 F.2d at 219-20, if land over which a channel changes during abnormal high water periods, inundating all intervening land masses, is identifiable as the same land mass upon subsidence of the high water, the boundary does not change even though the land's surface may be somewhat eroded.

Defendants' experts also relied upon inferences drawn from the existence of remnant channel formations, from the parallel positioning of bars A, B, C and D and their interpretation of applicable principles of hydrology. The record, in our judgment, requires us to give little or no probative effect to the ultimate conclusion reached from these factual premises.

B. Remnant Channels.

The defendants rely on evidence of remnant channels in the Blackbird Bend area as a "common phenomenon" associated with the progressive and gradual movement of a channel as a result of accretion. However, this evidence was proffered only as a possible alternative explanation to the plaintiffs' evidence that the remnant channel areas demonstrated avulsive changes in the thalweg.⁴⁸

The evidence further reflects that Dr. John F. Kennedy testified that, as the thalweg shifted to the west, the low energy level of the river in the former channel created by the movement would result in deposition there. The defendants conclude from this that the shift in the river was "a consequence of progressive scour and deposition." The testimony of defendants' expert, Dr. Kennedy, showed, however, that the shift of the thalweg is often the responsible agent for the

⁴⁸ The Tribe and the government substantiated their argument that the remnant channels were more consistent with avulsive than accretive movement by presenting evidence of soil samples taken in the area immediately to the east of the Barrett Survey line which showed concentrations of silt and clay in the remnant channels. Concentrations of silt and clay were said by plaintiffs' experts to be inconsistent with the gradual, imperceptible, and progressive action associated with accretion which was said to produce more uniform deposits. The defendants attempted to refute this by testimony that the remnant channel was cut off at the top by formation of a point bar and alluvial deposits would therefore not reach the channel.

"subsequent diminished sediment transport capacity of the water." Thus, the testimony is inconclusive as to whether the remnant channel was formed by accretion or avulsion since a remnant chute might also have been formed after the thalweg suddenly and perceptibly moved. In the latter case the deposition forming the remnant channel would be the effect of the low river energy in the area brought about by the sudden avulsive shift of the thalweg rather than a consequence of accretion. As the Supreme Court observed in *Arkansas v. Tennessee*, 246 U.S. at 175, 38 S.Ct. at 305,

if the stream leaves its former bed and establishes a new one as the result of an avulsion, the boundary remains in the middle of the former channel. An avulsion has this effect, whether it results in the drying up of the old channel or not. So long as that channel remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretion; but when the water becomes stagnant, the effect of these processes is at an end; the boundary then becomes fixed in the middle of the channel as we have defined it, *and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores but as an ultimate effect of the avulsion.*

(Emphasis added).

None of the explanations for the remnant channels are, however, more than sheer conjecture and do not, under the factual circumstance shown here, constitute probative evidence of whether the movement occurred by either accretion or avulsion.⁴⁹

C. Bar Formation.

Just as the remnant channels may have formed as the effect of an avulsion rather than as the result of accretion, the parallel positioning of bars A, B, C and D, while perhaps

⁴⁹ See *Galloway v. United States*, 319 U.S. 372, 386-87, 63 S.Ct. 1077, 87 L.Ed. 1458 (1943). Raymond L. Huber, one of defendants' witnesses, conceded that, given the factual basis available to him, he was only able to give an "educated guess" as to what caused the river to move between 1875 and 1879.

characteristic of accretion, could have resulted from the accretion which followed as an effect of avulsion as well. Moreover, as we have discussed the actual surface positioning of those bars based on the 1879 map is conjectural since the contours were drawn at the high water stage which existed at that time.

D. Captain Friedkin's Experiments.

The final proofs which defendants and the trial court relied on to establish accretion as the cause of the river's movement were Captain Friedkin's experiments and general principles of hydrology. Both Friedkin's experiments and principles of hydrology, however, provide strong evidence that avulsive change may have produced the 1879 movement. Friedkin noted that when a meander bend reaches its limiting width,⁵⁰ as it is conceded Blackbird Bend had here, it does not stop caving its banks. Instead, "[t]he flow short-cuts over the convex bars of bends, chute channels form, and a new bend develops a little farther downstream." J. Friedkin, *Meandering of Alluvial Rivers* 14 (1945) (footnote omitted). Such chute channels⁵¹ are avulsive since the channel moves around or over, not imperceptibly through the interjacent land. One of the defendants' witnesses, Dr. George R. Hallberg, testified that it was quite possible that chutes similar to those described by Friedkin could have formed along the eastern edge of Blackbird Bend, although he felt the area was probably submerged when this occurred. Hallberg's testimony concurred with the government's expert, Dr. Paul McQuivey, a research hydrologist, who testified that, when a river is at high flow it tends to increase its radius, that is, it tends to take a more direct course rather than a meandering

⁵⁰ The limiting width of a meander bend is the maximum distance the river will travel away from the general direction of a river's flow.

See J. Friedkin, *Meandering of Alluvial Rivers* 14 (1945).

⁵¹ A chute channel is defined as "a channel across a bar or a pointway channel. It differs from cut-off, wherein a river cuts through a narrow neck which has been developed between the upper and lower arms of a bend." *Id.* n. 1.

one.⁵² To do so, he continued, the thalweg moves to the inside of the bend, and erodes new chute channels⁵³ through the point bar. Eventually, the record shows, one of the chute channels large enough to carry the main flow of the river, and the river abandons the old channel.⁵⁴ *Cf. Veatch v. White*, 23 F.2d at 70.

In addition to the evidence suggesting that the movement of the river in 1879 could have occurred through a series of chute channels, the evidence also supports the possibility that during this same time a cut-off could have occurred across the neck of Blackbird Bend.⁵⁵ Friedkin also described the conditions when a cut-off is likely:

⁵² Dr. Kennedy, defendants' expert, verified McQuivey's testimony in observing that "(d)uring these extreme inundations, the channel, of course, likes to take a shorter path."

⁵³ The fact that during high water a river's flow tends to move to the inside of a meander bend was substantiated by the defendants' witness Huber who testified:

I will show you an example of a chute cut-off. Take the example of Tieville Bend, which is just below the Blackbird Bend area, below the Barrett Survey—

Now there was a shore chute which had never entirely dried up, had some flow, so that in the high water period of 1943 and later again in 1952 (the velocity across this area from the upper end to the lower end of the chute was so great as compared with the velocity around the old bend that it caused some filling of the old channel and it caused a new channel to develop.

Essentially this channel filled up at the upper end to the point that I believe you can walk across it. The lower end is still open, so this would be a chute avulsion.

Huber also pointed out that:

In a very low stage there is insufficient hydraulic energy for the river to cut across any sandbars with the velocity of two or three miles to an hour—two to three miles an hour, I said, so that it has to follow the easternmost high bank. Then as the stage increases up to flood stage, which could be even up to ten miles an hour, a channel will then seek the shorter path across the area, across the bare peninsula, and develop a new channel west, which will be even deeper than the channel against the main bank, for the reason that you have greater bed scar [sic; should read scour], you have greater discharge.

⁵⁴ McQuivey pointed out several remnant channels in the area of the peninsula.

⁵⁵ In *United States v. Flower*, 108 F.2d 298 (8th Cir. 1939), the court found a neck cut-off had occurred only a few miles above Blackbird Bend in 1916 after the river had formed a very wide meander bend.

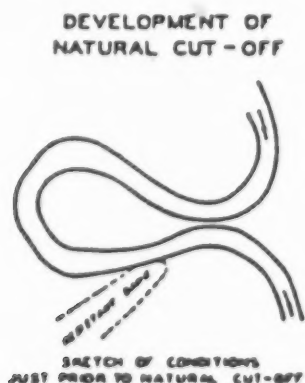
Natural cut-offs occur when a meandering river develops and finally erodes through a narrow neck between the upper and lower arms of a bend. . . . In over 50 laboratory streams in uniform materials not a single cut-off of this type developed. This fact indicates that natural cut-offs result from local differences in the erodibility of bank materials.

* * * * *

With all bends in a meandering river migrating down the valley at the same rate, a cut-off cannot possibly develop. The upper arm of a bend never catches up with the lower arm. For a natural cut-off to develop, erosion on the downstream bank of the lower arm of a bend must be slower than along the upper arm. Generally, when a cut-off develops, erosion in the bend proper has taken place so that the flow in the lower arm of the bend has become directed up-valley . . . and a narrow neck has developed. It is therefore, indicated that it is the local differences in erodibility of the bank materials in natural rivers which cause narrow necks to form and cut-offs to develop.

Friedkin, *supra* at 16.⁵⁶

⁵⁶ Friedkin provides the following illustration of the circumstances which promote natural cut-offs.



Friedkin, *supra* plate 25.

An examination of Tribe Exhibit 96, an 1875 map of Monona County, Iowa, shows a narrowing of the meander bend in the area between sections 29 and 30 which closely resembles Friedkin's sketch.

There exists strong corroborative proof of such occurrences from Barrett's field notes made during his 1867 survey. He wrote:

Until very recently, appearances indicated that this point was increasing in size from the deposits and drift of the river; but, during the present season, the river, rising to a great height, partly worked a channel across it, which may, eventually, entirely detach it from the Nebraska shore, rendering it an island in the river.

Tribe exhibit 26E, at 6.

The evidence also demonstrated that the Iowa south bank of the Blackbird Bend area was composed of erosion resistant material which would have prevented the southerly movement of the meander bend and made a cut-off possible. Cf. Friedkin, *supra* at 16-17.⁵⁷ In addition, the record shows that the potential for breakthroughs in the 1875 through 1879 period was enhanced by high water flows during those years.⁵⁸

⁵⁷ In the years immediately prior to 1879 the north and south banks of the Blackbird Bend meander lobe had considerably narrowed. Noting this condition, Dr. Robinson testified that:

(F)rom a study of river morphology we can predict that something is about to happen. The river is out of balance with its environment and it's because of this resisted layer at the south that does not allow the classic of the wood [sic] where we have homogeneous materials throughout the river to move south.

I would predict if I were in a study that there would be a point bar cut-off or a shoot [sic] developed through there that would develop into the main channel of the river and we would have an abandonment of the 1875 channel and the development of a new channel on a shorter and straighter course between the two limbs of the meander.

⁵⁸ Studies made by the Corps of Engineers received in evidence also lend support to the concept that channels often change location precipitously in both high and low stages. The report reads:

During flood stages the general movement of sand is in a measure arrested on the shoals, and, as a consequence, the low-water channels leading through them are silted up, while new ones are developed which accommodate the high-water flow. As the river falls these latter channels are silted up, and the water ponds up behind the bar until sufficient head is attained to force a breach through the crest at one or several points.

Based on the foregoing analysis we find the factual predicate, supporting defendants' theory as the causative reason for the river's movement, is in large part conjectural and the opinions drawn therefrom must be viewed as speculative. Under the circumstances we hold that the defendants have failed to meet their burden of proof that the significant and marked changes of the Missouri River between 1875 and 1879 were the result of erosion and gradual imperceptible accretion to the Iowa bank.

VII. *The River Between 1879 and 1912*

In 1881 the highest flood waters of any time since reliable records have been kept occurred on the Missouri River. However, no maps were introduced to show the location of the river between 1879 and 1890. The next map available after 1879 is the 1890 Missouri River Commission map, see Plate V, which shows the thalweg to have moved north and somewhat to the east of its 1879 location. Significantly, the river is shown to occupy far less area than that shown on the 1879 map and the land to the east of the thalweg is shown as stabilized soil with permanent vegetation growing on it.

The trial court felt these facts "simply [show] the normal and logical progression of the accretion which was shown to be forming in 1879" 433 F.Supp. at 79. There exists no factual predicate whatsoever to support this conclusion.⁵⁹

After 1890 the river moved in a northerly and easterly direction to a position shown as the northerly high bank in approximately 1912. See Plate III.

We now turn to the trial court's findings and the factual discussion involving the marked change in the course of the river between 1912 and 1923.

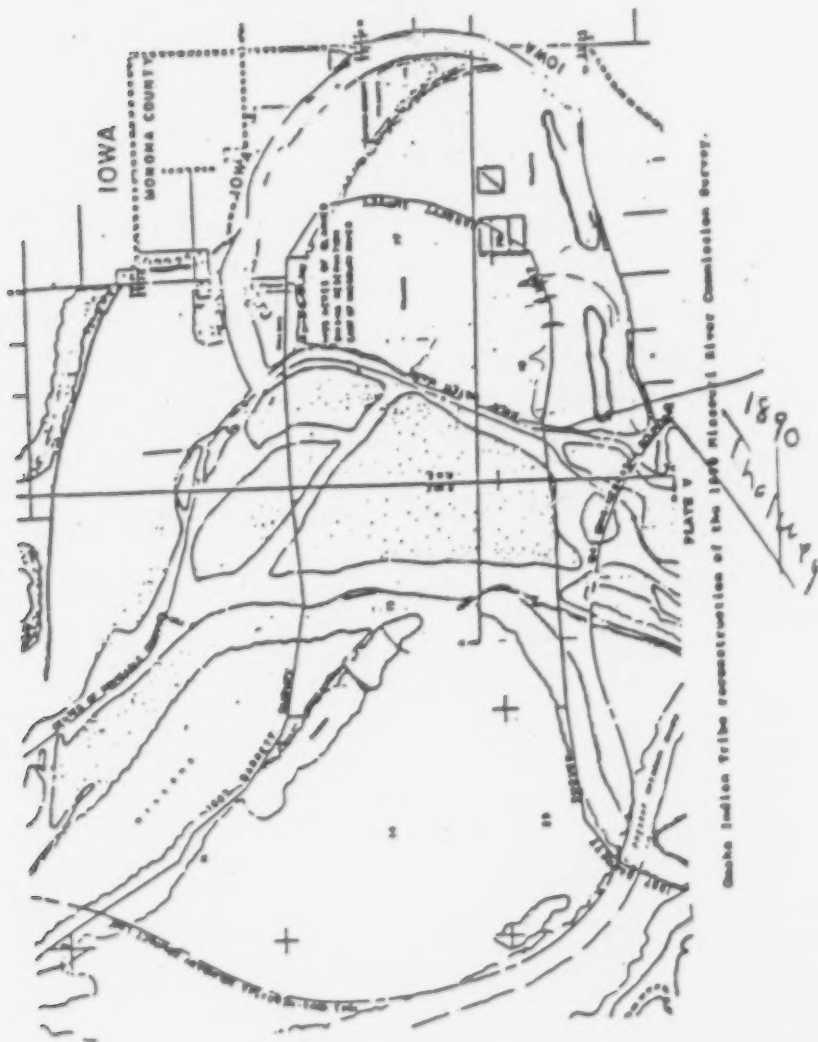
During the course of the low-water season the main channel keeps shifting from one subsidiary channel to another, these changes of location are often very great, and the uncertainty thereon attendant forms one of the greatest drawbacks to navigation. The high-water channels, before alluded to, are, in the Missouri, of the same general character as those of low-water, but they rarely coincide with them. They are less tortuous as a rule, but not of much greater depth, and they are liable to the same rapid changes of location. *Preliminary Report Upon the Improvement of the Navigation of the Missouri River*, in Annual Report of the Chief of Engineers app. S, at 1655 (1881).

⁵⁹ Assuming that the 1890 map shows stabilized accretion land, as the district court found, it is plausible that the "accretion" may have formed from deposition of sediment resulting from a sudden and perceptible shift of the thalweg.

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VIII. *The 1912-1923 Movement of the Thalweg.*

The trial court found, again relying upon the defendants' analysis of the evidence, that the 1912 through 1923 movement of the Missouri River was also a direct result of erosion and imperceptible accretion to the Iowa riparian land. The court concluded:

[T]he Court finds that there were no avulsions in the Blackbird Bend area between 1890 and 1923, and that the movements of the river during that period of time were erosive in nature so that accretion was being formed on the side of the river opposite the erosion. The Court finds that after 1890 the river moved erosively until it reached what is now the northerly high bank following which it commenced a southern migration throughout the Blackbird Bend area until it reached its 1923 position. This migration eroded almost all of the westerly end of the land as surveyed by Barrett in 1867 and the deposition which occurred during the southerly migration of the river was accretion to the northerly and easterly high banks and thereby became accretion to the Iowa riparian owners.

433 F. Supp. at 85.

The defendants contend that the river moved in a slow progressive movement south and westward to bring about the remarkable change in the thalweg between 1912 and 1923. Compare Plate III with Plate IV. The basic disagreement between the experts for both sides still exists. The defendants' experts—Hallberg, Kennedy, and Raymond I. Huber—testified that sometime around 1912 the river moved away from the northerly high bank and began to erode to the south depositing accretion materials to Iowa riparian land. It was their theory that all of the land in the path of the river was eroded away. On the other hand, the plaintiffs' experts varied in their appraisal of the river movement during this period. Elmer M. Clark, an aerial surveyor, believed that the river achieved its 1923 position by one or more sudden and noticeable movements of the channel. Plaintiffs' witness, Dr. Charles S. Robinson, a geologist, thought the southward

movement occurred suddenly during one high water period in a matter of a few days or months. Dr. McQuivey, the government's expert, felt that the river moved as a result of several avulsive point bar cut-offs.

In reviewing the record, we cannot, but echo the words of witness Huber, that it is again only an "educated guess" as to just how the river moved. The extremely speculative assessment of the reasons for the river's movement offered by the defendants is not sufficient to sustain their burden of proof.

The evidence relied upon by the defendants, and the court in reaching its conclusion that accretion caused the 1912-1923 river movement, falls essentially within four areas of discussion. First, the defendants' experts point to evidence of the absence of identifiable land in place. This evidence consisted of testimony from witnesses who had lived in the Blackbird Bend area at the time of the movement that the land on the Iowa side was "new accretion land." Defendants' witnesses also pointed out that there were no geologic or geomorphic formations evident that were typical of avulsive river movement. In addition, the defendants alleged that no trees could be found which predated the movement away from the northerly high bank.⁶⁰

Second, defendants' experts asserted that a change in the Missouri river above Blackbird Bend altered the angle of approach of the river into Blackbird Bend ultimately producing a southerly migration of the river. In support of this point the defendants introduced in evidence a 1912 survey showing a developing sand bar on the Iowa shore (referred to as the Fairchild sand bar) said to be consistent with a changed angle of entry. The defendants' witnesses also

⁶⁰ The testimony related to the existence of trees as proof of identifiable land in place was conflicting. Two trees pre-dating the 1912 movement were identified by the Tribe's witness George S. Gorsuch, a forester with extensive experience in dendrochronology (the study of time-span within trees). The defendants contended, and the trial court found that these trees were located on the edge of a sandbar that had allegedly built south of the northerly high bank prior to 1912. However, the contours of the sandbar were never surveyed and its exact location could not have been ascertained.

contended that hydrological principles would predict erosive changes in the river as a result of the change of the angle at which the river entered Blackbird Bend. Complimenting this proof were several Indian allotment letters which documented erosion in the northwestern part of the Blackbird Bend meander lobe at a point opposite the formation of the Fairchild sand bar.⁶¹

Third, topographic cross-sections prepared by Dr. Hallberg showed that the land surface gradient in the Blackbird Bend area sloped from northwest to southeast, and that the land formations in the area were progressively lower in elevation in the southeast. In his opinion, this gradient was compatible with a theory of bar growth on the northeast side of the river as it migrated to the southwest.

Finally, the defendants relied on soil analysis which allegedly revealed findings consistent with the southward and eastward accretive movement of the river.⁶² The government's expert, Dr. McQuivey, had testified that analysis of soil samples taken in the area produced data indicating that the soil becomes sandier as one moves westward in the Blackbird Bend area. Dr. Hallberg utilized this data to theorize that the sandier nature of the western edge of Blackbird Bend indicated that remnant channels had formed behind accretive point bars deposited as the river slowly moved to the southwest.⁶³

Very few facts relating to the actual river movement in the period between 1912 and 1923 are proven on the record. First it is clear that the thalweg had moved substantially in

⁶¹ The allotment letters concerned requests by certain members of the Omaha Tribe that their land allotments be exchanged for new allotments because the land originally allotted them was being or had been washed away by the Missouri River.

⁶² The parallelism of the bars between the remnant channel formations was also relied on to support an accretion theory. We have discussed the speculative significance of the parallelism of land features earlier. See discussion in section VII(C) *supra*.

⁶³ Hallberg stated that the existence of marshy areas and well-defined channel remnants to the east, in contrast to drier areas and less well-defined remnant channels to the west, supported the theory that as the channel shifted away from its bank to keep up with the growing point bar it subsequently backfilled the area creating the remnants.

a relatively short period of time; perhaps as few as three years,⁶⁴ but no more than 11 years. Second, as the trial court found, substantial high water periods occurred in 1905, 1906, 1912, 1913, 1915, 1916 and 1920. 433 F.Supp. at 83. Third, the angle of approach of the river had changed subjecting the adjacent land in place to at least surface erosion. Furthermore, substantial erosion was undeniably occurring along the Nebraska shore⁶⁵ Finally, it is beyond dispute that remnant channel-like formations may be identified by soil samples and aerial photographs. These established facts do not prove that either accretion or avulsion caused the river's movement; the issue remains whether they may form a sufficient factual predicate for defendants' witnesses to conclude that the marked change of the thalweg was a gradual one directly caused by erosion and imperceptible deposition to the Iowa land. We hold the evidence too conjectural and the ultimate conclusion reached too speculative to sustain the defendants' burden of proof under § 194.

The expert opinions and the lay testimony indicating that land in place could not be identified in the area are not sufficient to prove that accretion was responsible for the 1912-1923 movement. It is well established on the record that after 1890 as the river moved in a northerly direction alluvion soil subject to frequent inundation was deposited throughout much of the area. Thereafter, when the river moved southwesterly away from the northerly high bank, either by accretion or as the result of avulsion, this sandy area would not reveal any conspicuous identifiable features. The fact that some erosive action occurred in the northwest corner of the Barrett Survey area does not support the inference that accretion was the primary cause for the movement. As we have noted earlier, erosion may readily occur along with

⁶⁴ The testimony of Ross Willey indicated that the river still flowed in the easterly English Bayou area in 1916. Another lay witness, Judge George W. Prichard, who had traveled the area on horseback in 1919, gave testimony which tends to support the fact that most of the southerly movement of the river had been completed by 1919.

⁶⁵ A large stand of timber shown in the northwest corner of the Barrett Survey area prior to 1923 was no longer visible in a 1927 aerial survey of the area, indicating the land on which it stood had been eroded.

avulsive movements of a river; the two phenomena may often take place together. Under the circumstances the absence of identifiable land in place has little probative value in determining whether erosion and accretion were in fact the responsible elements for the 1912 through 1923 movement of the river.⁶⁶

Aside from the inconclusive evidence relating to identifiable land in place, little can be found in the record that supports the defendants' position. The fact that the river changed its angle of approach does not in itself support an inference that accretion was responsible for the changed movement of the thalweg. Although the change may have altered the erosion patterns in the Blackbird Bend area, it is still a tenuous conclusion at best to infer from this that the thalweg moved imperceptibly. While reasoned deductions may be made from probative facts, the ultimate conclusion may not rest on mere guesswork. Similarly, as in the 1875-79 river movement, the sandbars and the gradient of the land could have just as easily occurred from deposition resulting from low river energy caused by avulsive movements of the river as by a gradual shift or movement of the thalweg.

The little solid scientific evidence in the record contradicts the defendants' theory of how the river moved. Soil samples taken in the area by government experts⁶⁷ corroborate Dr. McQuivey's testimony of the existence of four major

⁶⁶ The absence of trees in the area north of the Barrett Survey does not support an inference that the land had been completely eroded by the river's southwesterly movement. Depending upon the nature of the river's northerly movement, all trees growing in the area prior to 1912 may have been washed away. In addition, the record indicates that many of the trees growing in the area after 1923 were cut for firewood in the 1930's.

⁶⁷ The government had performed extensive soil analysis of the Blackbird Bend area. On government exhibit 151, which summarized the results of that analysis, the government's experts depicted those areas within the Blackbird Bend area where the soil samples indicated remnant channels, and those areas where the soil samples indicated bar-like formations.

channel remnants.⁶⁸ Aerial photographs made in 1925 also indicated the channel remnants in the area. Although the defendants presented an alternative theory of how the remnant channels might have formed, their existence is strongly probative of the government's theory that the river migrated from the northerly high bank to its 1923 position by a series of four point bar cut-offs.

We conclude on the basis of an overall review of the record that it is entirely speculative to determine when or how the thalweg moved to the position shown on the 1923 map.

IX. Conclusion.

The district court's ruling, adopting the defendants' theory of their case, depends on the assumption that the doctrine of avulsion is not applicable without evidence of identifiable land in place. On the record presented we deem this an erroneous legal assumption. When considered in the context of the broader parameters of evulsion we hold the defendants' case establishes only speculative inferences as to whether the thalweg moved by accretion or avulsion in the critical time periods involved. The essential inferences cannot be left to speculation or conjecture. Under the

⁶⁸ These soil samples point out the existence of the remnant channels. McQuivey, the government's expert, testified that:

Looking at Sample 61 and 56, 61 was slit on the top. There was some fine, very fine sand down to a depth of four feet, and then down to a depth of approximately twenty feet was soil clay. That is an indication of an old channel-type deposit, where the water has not been running in, and it's an area of back water or slack water to where the slits and the fine clay can be settled out.

So basically, we can determine from the soil samples if there was an old channel there.

The defendants' witness did not dispute the validity of the soil samples but, instead, presented only alternate theories as to how possibly the non-alluvion soil was deposited.

circumstances, we hold that the defendants have failed in sustaining their burden of proof under § 194.⁶⁹

We recognize that to require the defendants to prove the cause of the river's movement occurring some 100 years after the event is indeed an onerous burden. This may seem to be an injustice when one considers have possessed and continuously farmed the land without protest for nearly 40 years. However, as the trail judge observed in a letter written to counsel after trial, divesting the Omaha Indian tribe of their original reservation land promotes an equal injustice.

While burdening either side in this case with proving the movements of the river occurring many years ago may result in undesirable hardships, the clear policy of the federal government mandates that the interests of the Omaha Indian Tribe be given their historical and statutory protection. These important possessory land interests cannot be taken away on proof that is basically speculative and conjectural.

The judgment of the district court is ordered vacated; the cause is remanded with directions to enter judgment

⁶⁹ How the river reached its outer eastern limit in 1875 or moved to its most northerly point in and around 1912 is outside the confines of this case. The Tribe contends erosion and accretion were responsible for these movements and there exists statements in the briefs in which it appears that the defendants have conceded this to be true. However, any such concession may have been predicated on an erroneous view of the law and should not be deemed binding under the circumstances. In using the word "accretion" in the context of the easterly movement from 1875 to 1879 and of the northeasterly movement from 1890 to 1912 we understand the defendants as merely saying that there has been deposition of land added to the Barrett Survey area. This land is all outside of the Barrett Survey and beyond the limits of the reservation established by treaty in 1854. The application of § 194 placing the burden of proof on the defendants in the present litigation is not controlling as it affects the area outside the original reservation. We do not in any way attempt to prejudge the several claims; nor do we foreclose the right of the plaintiffs to urge that § 194 is applicable under different proof. We simply note that the same proof showing presumptive title (Treaty of 1854) to the reservation cannot govern any further litigation concerning the lands outside that area.

quieting title in the trust lands involved in this action⁷⁰ in the United States as trustee, and the Omaha Indian Tribe; the prior orders relating to escrow funds and accounting procedures governing the 2,900 acres within the original boundary of the Barrett Survey as originally ceded to the Tribe in the Treaty of 1854 are ordered dissolved.⁷¹

⁷⁰ The government excepted from its complaint any claim to approximately 400 acres of land within the Barrett Survey which may have been allotted to individual Indians and subsequently patented to non-Indians. Any current claims to those lands by the Tribe might be affected by issues of adverse possession and laches. We therefore remand to the district court those claims related to the land excepted from the government's complaint for a determination on the above mentioned issues.

⁷¹ Plaintiffs question whether the trial court's judgment was final since it lacked certification under Fed.R.Civ.P. 54(b). The claims here on appeal were severed from claims to land outside the Barrett Survey, asserted in C-75-4067, by order of Judge McManus. The severed claims in C-75-4067 had been previously joined with quiet title actions pertaining only to the 2,900 acres of land within the Barrett Survey filed by the United States in C-75-4024 and by the Tribe in C-75-4026 which are on appeal here. Thus the district court settled all of the questions of ownership involving the lands within the Omaha Indian Tribe's original 1854 reservation boundaries. Under the circumstances we view the severed claim in C-75-4067 as a wholly separate action which had been joined with the quiet title suits so that the judgment entered by the district court resolved the entire controversy then before it. Rule 54(b) therefore, has no application since all, not "fewer than all of the claims" before the trial court were resolved by its judgment.

APPENDIX K

(Signatures and proof of service omitted in printing.)

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

NO. C-75-4067

OMAHA INDIAN TRIBE, Treaty of 1854 with the United States
(10 Stat. 1043), Organized pursuant to the Act of June 18,
1934 (48 Stat. 984; 25 U.S.C. 476) as amended, *Plaintiff,*

vs.

DEFENDANTS:

TRACT I—BLACKBIRD BEND AREA

Agricultural & Industrial Investment Company;

* * * *

Lakin, Charles E.; Lakin, Florence

* * * *

Peterson, Otis

* * * *

R.G.P. Incorporated, an Iowa Corporation

* * * *

State of Iowa, State of Iowa Conservation Commission

* * * *

Wilson, Roy Tibbals

COMPLAINT

To quiet title for immediate access permanent injunction
order for quiet possession for damages.

(Filed October 6, 1975)

Comes now the OMAHA INDIAN TRIBE, acting pursuant to its Treaty with the UNITED STATES OF AMERICA (10 Stat. 1043 et seq.), made and concluded in the City of Washington on the sixteenth day of March, one thousand eight hundred and fifty-four, the Constitution and laws of the United States, the Omaha Indian Tribe being a body corporate established pursuant to its Constitution and By-Laws formulated and adopted by the Omaha Indian Tribe, and approved by the Secretary of the Interior, principal agent of the United States, Trustee for the Omaha Indian Tribe, the Omaha Indian tribe and its governing body, having been duly recognized by the Secretary of the Interior, all in accordance with Section 16 of the Act of June 18, 1934 (48 Stat. 987; 25 U.S.C. 476), and complains, alleges and avers that:

CLAIM NO. I

To quiet title in the Omaha Indian Tribe to 11,300 acres, more or less, of land in the Omaha Indian Reservation within the State of Iowa.

1. This Court has jurisdiction of this civil action brought by the Omaha Indian Tribe on its own behalf, pursuant to Section 1331 of Title 28 of the United States Codes, which confers jurisdiction upon this Court involving actions that arise " * * * under the Constitution, laws, or treaties" of the United States, "wherein the matter in controversy exceeds the sum or value of \$10,000" and pursuant to Section 1362 of Title 28 of the United States Codes which provides this Court " * * * shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises, under the Constitution, laws, or treaties of the United States."

2. From time immemorial the Omaha Indian Tribe, plaintiff herein, occupied a vast area of land totaling 5,283,265 acres which was intersected by the Missouri River and located in part in the present States of Iowa and Nebraska. The Omahas, from time immemorial, had and still have their own communities, institutions, laws, and customs, exercising inherent powers of self-government. For over a century and a half the Omaha Indian Tribe has entered into Treaties with the United States. The final Treaty, in so far as here pertinent, between those two sovereigns was signed in the City of Washington, on March 16, 1854 (10 Stat. 1043), the "Treaty with the Omaha, 1854" hereafter referred to as the Treaty of 1854.

3. By the Treaty of 1854, the Omaha Indian Tribe Reserved to itself—did not grant to the United States—the present Omaha Indian Reservation. That land thus reserved by the Omahas pursuant to their Treaty of 1854, was all situated in the soon thereafter created Territory of Nebraska. Several years subsequent to the Treaty of 1854 the State of Nebraska was admitted into the Union.

4. The middle of the main channel of the Missouri River was the common boundary established between the Omaha Indian Reservation and the State of Iowa, all as prescribed by the Treaty of 1854, the Act of Congress for the admission of Iowa into the Union and the Constitution of the State of Iowa. Similarly, the middle of the main channel of the Missouri River was declared to be the common boundary between the States of Iowa and Nebraska.

5. The State of Iowa (1 Iowa Code Anno. 85 et seq.) and the State of Nebraska (2A Revised Statutes of Nebraska, 728 et seq.) ratified the Iowa-Nebraska Compromise Boundary Compact, which was approved by the Congress and became effective by the Act of July 12, 1943, Ch. 220 (57 Stat. 494). By that Compromise Boundary Compact the middle of the main channel of the Missouri River was no longer the common boundary between the State of Iowa, the Omaha Indian Reservation and the State of Nebraska. That Compromise Boundary between the State of Iowa and the

State of Nebraska, did not and could not affect the title to the lands of the Omaha Indian Tribe constituting its Reservation, which title to the lands involved is the subject matter of this Complaint.

6. The Omaha Indian Tribe, pursuant to its Treaty of 1854, the Constitution and laws of the United States, holds title to and is entitled to have full, peaceful and quiet possession of 11,300 acres, more or less, of land, being that part of the Omaha Indian Reservation, situated in Monona County, State of Iowa.

7. Those 11,300 acres of land, more or less, title to which is in the Omaha Indian Tribe and being that part of the Omaha Indian Reservation within the State of Iowa referred to in the paragraph of this Complaint which immediately precedes, are divided for the purposes of this litigation, into three separate tracts or parcels of land referred to throughout this Complaint as:

- a. Tract I, The Blackbird Bend Area,
comprised of 6,390 acres, more or less;
- b. Tract II, The Monona Bend Area,
comprised of 4,185 acres, more or less;
- c. Tract III, The Omaha Mission Bend Area,
comprised of 725 acres, more or less;
Totalling 11,300 acres, more or less.

8. Attached to this Complaint is a map, marked Exhibit A, entitled "Omaha Indian Reservation Boundary Determination", hereafter referred to as Exhibit A and by reference made a part of this Complaint, setting forth the Iowa-Nebraska Compromise Compact Boundary from the northern boundary of the Omaha Indian Reservation in the State of Iowa to the southern boundary of that Reservation in the State of Iowa.

9. There is likewise set forth on Exhibit A of this Complaint the eastern boundary of the Omaha Indian Reservation within the State of Iowa. Also set forth on Exhibit A of this Complaint are the eastern boundaries of the above

referred to: Tract I, The Blackbird Bend Area; Tract II, The Monona Bend Area; and Tract III, The Omaha Mission Bend Area of the Omaha Indian Reservation within the State of Iowa, all as set forth in paragraph 6 of this Complaint.

10. Attached to this Complaint, marked Exhibit B, entitled "Legal Description of the Omaha Indian Reservation Within the State of Iowa," hereafter referred to as Exhibit B of this Complaint, is a precise and accurate legal description of the Omaha Indian Reservation Within the State of Iowa. Those lands, the title to which resides in the Omaha Indian Tribe, all as averred above, are sometimes referred to in this Complaint as the Omaha Indian Reservation within the State of Iowa.

11. In clear violation of the Treaty of 1854, the Constitution and laws of the United States, and of the rights, title and interests of the Omaha Indian Tribe in and to the lands depicted on Exhibit A and as fully and accurately described in Exhibit B of this Complaint, all as averred above, the above named defendants and each of them, claim some right, title, interest or estate adverse to those rights, title, and interests of the Omaha Indian Tribe, in and to the lands of the Omaha Indian Reservation within the State of Iowa. Those adverse claims of the defendants and each of them, in and to the rights, title and interests of the Omaha Indian Tribe in and to the lands of the Omaha Indian Reservation within the State of Iowa, arise from illegal and willful trespasses upon and occupancy of those lands of the Omaha Indian Tribe and are invalid, illegal and, being totally without merit, are null and void and of no force and effect.

12. The Omaha Indian Tribe denies that the defendants or any of them have any valid right, title, interest or estate in or to any of the lands comprising the Omaha Indian Reservation within the State of Iowa, all of which are depicted on Exhibit A and described in Exhibit B of this Complaint, but rather the Omaha Indian Tribe affirmatively alleges those adverse claims of the defendants and each of them are illegal, invalid and totally without merit, all as averred above.

13. The Omaha Indian Tribe, by reason of the willful and illegal trespasses upon and occupancy of, and the illegal and invalid claimed rights, title, interests and estates in and to the lands comprising the Omaha Indian Reservation within the State of Iowa by the above named defendants and each of them, is now ~~and has been~~ for many years past, suffering irreparable damages and the Omaha Indian Tribe will, unless and until the relief and all of it prayed for in this Complaint is awarded to it, continue to suffer those irreparable damages.

14. The Omaha Indian Tribe is entitled to judgment by this Court entered against the defendants and each of them, adjudging, determining, declaring and quieting its title in and to the lands of the Omaha Indian Reservation within the State of Iowa, and denying each and every adverse claim of the defendants, and the Omaha Indian Tribe is entitled to a judgment and decree restoring it to full, peaceful and quiet possession of the full 11,300 acres, more or less, of the lands comprising that part of the Omaha Indian Reservation within the State of Iowa.

CLAIM NO. II

For Permanent Injunction, omitted in printing

CLAIM NO. III

For Immediate Possession and Payment of Damages, omitted in printing.

WHEREFORE, the Omaha Indian Tribe, Plaintiff herein, prays this Court for entry of a judgment in its favor:

* * *

4. Determining, declaring, adjudging and quieting the title of the Omaha Indian Tribe, Plaintiff herein, to the lands of the Omaha Indian Reservation within the State of Iowa, which lands are described with particularity in Exhibit B and clearly depicted and designated on

Exhibit A of this Complaint; determining, declaring and adjudging that Defendants have no right, title, interest or estate in or to the lands of the Omaha Indian Reservation within the State of Iowa, title to which resides in the Omaha Indian Tribe; forever restraining and enjoining the Defendants and each of them from claiming or asserting any right, title, interest or estate in and to the lands of the Omaha Indian Reservation within the State of Iowa referred to above; said Plaintiff prays for the establishment of the Plaintiffs estate and that the Defendants and each of them be barred and forever estopped from having or claiming any right or title to these premises adverse to the Plaintiff; forever restraining and enjoining the Defendants and each of them from interfering in any way with the free and ready access, full use and occupancy by the Omaha Indian Tribe, its individual members of that Tribe, agents, employees, lessees and designees and the United States of America, Trustee for the Omaha Indian Tribe and its authorized agents, employees, and contractors.

* * *

(Paragraphs 1 through 3 and 5 through 8 omitted in printing).

OMAHA TRIBE OF NEBRASKA

By: /s/ Edward L. Cline

Dated: October 6, 1975.

ATTORNEYS FOR TRIBE
O'BRIEN & O'BRIEN

By: /s/ John T. O'Brien
916 Grandview Blvd.
Sioux City, Iowa 51101

(Verification omitted in printing).

(Exhibits B (land description), C-1 (Barrett Survey retracement description) and D (6/5/75 order, printed following complaint in C75-4026) omitted in printing).

APPENDIX L

IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, CHARLES G. LAKIN, FLORENCE LAKIN,
R.G.P., INCORPORATED, an Iowa Corporation, HAROLD JACK-
SON, OTIS PETERSON, TRAVELERS INSURANCE COMPANY and
the STATE OF IOWA,

Defendants.

(Filed May 19, 1975)

**COMPLAINT TO QUIET TITLE AND
FOR INJUNCTIVE RELIEF**

CLAIM I

1. The United States is plaintiff in this action and this court has jurisdiction under 28 U.S.C. 1345.

2. The United States owns land in Monona County, Iowa, which is described as follows:

All descriptions are from the T.H. Barrett Survey.

Township 24 north, Range 10 east, 6th P.M. (Plat approved October 2, 1867).

Section 10, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 11, lots 3, 4, 5, 6 and 7, NW $\frac{1}{4}$ SW $\frac{1}{4}$, S $\frac{1}{2}$ SW $\frac{1}{4}$, and all that portion of lots 1 and 2 east of the 1943 Iowa-Nebraska compact line, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 13, lots 1, 2, 3 and 4, S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$.

Section 14, lot 1, NW $\frac{1}{4}$ NE $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, S $\frac{1}{2}$, except certain lands allotted to individual members of the Tribe and sold to non-members.

Section 15, all that portion east of the 1943 Iowa-Nebraska compact line.

Section 22, all that portion east of the east or left bank of the present Missouri River.

Section 23, lots 1 and 2, N $\frac{1}{2}$ NE $\frac{1}{4}$ and NE $\frac{1}{4}$ NW $\frac{1}{4}$, and all that portion of lot 3 and the W $\frac{1}{2}$ NW $\frac{1}{4}$ east of the east or left bank of the present Missouri River.

Section 24, lots 1, 2, 3 and 4.

Township 24 north, Range 11 east 6th P.M. (Plat approved October 2, 1868).

Section 17, lots 1, 2, 3 and 4.

Section 18, lots 1, 2, 3 and 4, S $\frac{1}{2}$ N $\frac{1}{2}$, S $\frac{1}{2}$.

Section 19, lots 1, 2, 3 and 4.

Section 20, all of the fractional section.

The lands described are believed to contain approximately 2900 acres.

In addition to the above-described lands, the plaintiff claims for the use and benefit of the Omaha Tribe of Indians all lands in the bed of the Missouri River as it existed when

the Omaha Indian Reservation was created extending from the lands described to the center of the main channel of the River.

3. The lands described in paragraph 2 are a part of the Omaha Indian Reservation to which the United States holds title for the use and benefit of the Omaha Tribe of Indians.

4. The Omaha Tribe of Indians and members of that Tribe are now in possession of the lands described in paragraph 2.

5. The defendants, or some of them, are claiming some right to title or interest in and to the lands described in paragraph 2 and are asserting the right to possession of those lands. The claims of defendants are null and void and of no effect.

6. The plaintiff is entitled to a judgment quieting its title to the lands described in paragraph 2 to be held for the use and benefit of the Omaha Tribe of Indians, upholding the right of possession of the Omaha Tribe and its members to those lands, and declaring that the defendants have no right to title or interest in and to such lands and no right to the possession thereof.

7. The plaintiff and the Omaha Tribe of Indians will suffer irreparable injury unless judgment is entered by this court upholding their title and right to possession of the lands described in paragraph 2.

WHEREFORE, the plaintiff prays that judgment be entered as follows:

(a) For a preliminary injunction maintaining the Omaha Tribe and its members in possession of the lands described in paragraph 2 hereof until the rights of the parties of this action can be determined by this court.

(b) For a judgment quieting the title of the United States to the lands described in paragraph 2 for the use and benefit of the Omaha Tribe of Indians; declaring that defendants have no right to title in or to such lands, or any of them; and enjoining the defendants from

asserting any title to such lands or interfering in any way with the possession, use and occupancy of such lands by the United States, the Omaha Tribe and its members.

(c) For such other relief as the court may find justified and for the costs of this action.

CLAIM II

8. Plaintiff adopts and incorporates paragraphs 1 through 7 above.

9. Defendants Harold Jackson and Otis Peterson heretofore on or about April 23, 1975, filed a petition in the District Court of Iowa in and for Monona County which appears in the records of that court as Equity No. 18965, a copy of which is attached to this complaint. Named as defendants therein are six Indians in their individual capacity and as representatives of all members of the Omaha Tribe of Nebraska, their agents, employees or representatives.

10. The plaintiffs in Equity No. 18965 claim to be tenants in actual occupancy of a portion of the lands described in paragraph 2 of this complaint and seek Temporary and Permanent Writs of Injunction prohibiting members of the Omaha Tribe from occupying said lands or interfering with Jackson's and Peterson's farming of the land claimed by them. The purpose and effect of the petition in Equity No. 18965 is to challenge the title and possession of the United States and of the Omaha Tribe of Nebraska to those lands claimed by Jackson and Peterson. The United States is an indispensable party to Equity No. 18965. It is not a party to Equity No. 18965 and cannot be made a party to that action. By filing this action, the United States has brought before this court all interested parties so that all conflicting claims may be litigated in one action. Any judgment entered in this action will be binding upon the Omaha Tribe of Nebraska and its officers since they are represented by the United States.

11. The United States is entitled to have title to the property claimed by it on its own behalf and on behalf of the

Omaha Tribe of Nebraska quieted against any claims by defendants Jackson and Peterson.

12. Equity No. 18965 is an attempt by defendants Jackson and Peterson to wrest possession from the United States and its wards in an action to which the United States is not and cannot be made a party, to the permanent and irreparable injury of the United States and its Indian wards. The mere pendency of the state court action constitutes a threat against and an interference with the substantial rights of the United States and its wards, and threatens the jurisdiction of this court to hear and determine actions brought by the United States to quiet title to land.

WHEREFORE plaintiff prays:

(a) That this court enter an order permanently enjoining defendants Jackson and Peterson, their agents, employees, or assigns and all persons in active concert or participation with them from prosecuting or attempting to prosecute the action entitled Jackson, et al. v. Cline, et al., Equity No. 18965, In the District Court of Iowa in and for Monona County, insofar as that action relates to any lands described in paragraph 2 of this complaint;

(b) For an order permanently enjoining defendants Jackson and Peterson and their agents, employees, or assigns and all persons in active concert or participation with them from enforcing or attempting to enforce an order entered in Equity No. 18965 on or about May 15, 1975, which plaintiff is informed and believes prohibits certain members of the Omaha Tribe from maintaining possession of a portion of the lands described in paragraph 2 of the complaint and/or prohibiting them from interfering with farming activities by defendants Jackson and Peterson;

(c) For preliminary injunction restraining defendants Jackson and Peterson and their agents, employees or assigns and all persons in active concert or participation with them from prosecuting or attempting to prose-

cute Equity No. 18965 or enforcing or attempting to enforce the order entered therein on or about May 15, 1975, until the rights of the parties in this action can be determined by this court;

(d) For such other and additional relief as may be just and proper.

EVAN L. HULTMAN

United States Attorney

By /s/ Robert L. Sikma

Assistant United States Attorney
Northern District of Iowa

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

No. C 75-4024

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ROY TIBBALS WILSON, *et al.*,

Defendants.

No. C 75-4026

OMAHA INDIAN TRIBE, *etc.*,

Plaintiff,

vs.

HAROLD JACKSON, *et al.*,

Defendants.

No. C 75-4067

OMAHA INDIAN TRIBE, *etc.*,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT
COMPANY, *et al.*,

Defendants.

ORDER

(Filed April 5, 1976)

This matter is before the court on the following motions:

(Listing and discussion of a number of categories of
motions omitted in printing.)

MOTIONS TO DISMISS

Numerous defendants in No. C 75-4067 move to dismiss on the ground that no claim is stated because it appears upon the face of the complaint that all claims alleged are barred by the pertinent Iowa statute of limitations, § 614.1(5), Code of Iowa (1975). It is the court's view that the motion is not well taken.

Even assuming Iowa law to be applicable on this issue, the Iowa high court has consistently held that the doctrine of adverse possession as governed by the statute does not effect a change of title against governmental bodies so as to prevent the exercise of their governmental functions. *E.g.*, *Twining v. City of Burlington*, 68 Iowa 284, 27 N.W. 243 (1886); *Johnson v. City of Shenandoah*, 153 Iowa 493, 133 N.W. 761 (1911); *Sioux City v. Betz*, 232 Iowa 84, 4 N.W.2d 872 (1942). Here the United States is a named party in one action and has a governmental interest in protecting the title of all lands held in trust for an Indian tribe pursuant to treaty. See *Heckman v. United States*, 224 U.S. 413, 437-438, 32 S.Ct. 424, 56 L. Ed. 820 (1912).

Furthermore, plenary control over tribal rights to Indian lands became the exclusive province of Federal law upon adoption of the Constitution. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667, 94 S. Ct. 772, 39 L. Ed. 2d 73 (1974). The primacy of Federal law has been asserted through the Non-intercourse Act of 1790, 1 Stat. 137, and its successors, now codified at 25 USC § 177.

The latter statute provides *inter alia*:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered pursuant to the Constitution.

If title to tribal lands is not alienable by the Indians, *a fortiori* title cannot be obtained against them by adverse possession. *United States v. Schwartz*, 460 F.2d 1365, 1371-1372 (7th

Cir. 1972); *United States v. 7,405.3 Acres of Land*, 97 F.2d 417, 422-423 (4th Cir. 1938).

Initially, the court finds that the interests of judicial convenience and economy are not being served by consolidation of these three cases *in toto*. The posture of No. C 75-4067 is hindering an orderly and efficient administration of justice in the other two cases, wherein the parties, issues and boundaries of the controverted lands are more clearly in focus. Therefore, trial of all issues relating to lands in No. C 75-4067 which are not also within the subject res of Nos. C 75-4024 and C 75-4026, and all issues of damages, will be severed. Cases Nos. C 75-4024 and C 75-4026 will remain consolidated with each other and with the portion of No. C 75-4067 relating to the identical subject res.

Ruling on the motion to strike jury trial demand will be reserved with respect to the severed portion of No. C 75-4067. The other two cases, and the quiet title issues in No. C 75-4067 relating to the identical lands in the Blackbird Bend region, are equitable in nature. The Tribe has possession of these lands.² An action to quiet title and obtain injunctive relief by a party in possession is equitable, for which trial is not required. *Humble Oil & Refining Co. v. Sun Oil Co.*, 191 F.2d 705, 718 (5th Cir. 1951), *cert. denied*, 342 U.S. 920, 72 S. Ct. 367, 96 L. Ed. 687.; *United States v. Mulligan*, 177 F. Supp. 384, 386 (D. Ore. 1959); *cf. Zunamon v. Brown*, 418 F.2d 883, 887-889 (8th Cir. 1969). Plaintiffs' motions to strike jury trial demand will be granted with respect to these consolidated cases:

Motion for Partial Summary Judgment

Plaintiff Tribe moves for summary judgment on several issues raised by way of affirmative defenses in the answers of certain defendants. Summary judgment is appropriate only where no genuine issues of material fact remain unresolved

² In its ruling on the motion for preliminary injunction, the court resolved the issue of the status quo by ruling that the Indians were then in possession under a claim of title.

and the movant is clearly entitled to judgment as a matter of law. Rule 56, FRCP; *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944); *Chicago & Northwestern Ry. Co. v. Hospers Packing Co., Inc.*, 363 F. Supp. 697 (N.D. Ia. 1973). Here defendants have failed to file any resistance generating factual issues as required by Rule 56(e), FRCP, and it appears that the issues remaining on these defenses are largely questions of law.

The court has previously indicated that it has subject matter jurisdiction over these actions, 28 USC §§ 1331, 1345, 1362, and plaintiffs' motion is granted on this issue. It is also the court's view that the complaints do state a cause of action, and the motion will also be granted on this issue.

With respect to those issues listed in subparagraphs c-h, summary judgment is appropriate as a matter of law only with respect to the establishment of title aspects and not on the damages issues. As stated above, state statutes of limitations cannot effect adverse possession of lands held in trust by the United States for the benefit of Indian tribes. Similarly, state rules of laches, estoppel, or abandonment have no applicability to the title dispute in the instant action. *United States v. Schwarz, supra* at 1372. Summary judgment will be granted to the extent indicated above, and denied in all remaining respects.

April 5, 1976.

/s/ Edward J. McManus, Chief Judge
United States District Court

APPENDIX N

In the
Supreme Court of the United States

October Term, 1964

—o—
No. 17, Original
—o—

STATE OF NEBRASKA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

—o—

APPENDIX TO
DEFENDANT'S BRIEF AND ARGUMENT
BEFORE THE SPECIAL MASTER
HONORABLE JOSEPH P. WILLSON

—o—

RICHARD C. TURNER

Attorney General of Iowa
State Capitol Building
Des Moines, Iowa 50319

MICHAEL MURRAY

Special Assistant Attorney
General of Iowa
Logan, Iowa 51546

MANNING WALKER

Special Assistant Attorney
General of Iowa
233 Pearl Street
Council Bluffs, Iowa 51501

Attorneys for Defendant.

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1961	<u>Copy of Assignment of R. E. Contract — Henry K. to Raymond G. Peterson.</u>	<u>P-1759</u>
1965	<u>Copy of Warranty Deed — Kirk to Peterson.</u>	<u>P-1760</u>
196...	<u>Copies of pleadings and documents in <u>Lakin v. Iowa</u>, 17400, Monona County, Iowa, District Court.</u>	<u>P-1761</u>
196...	<u>Copies of pleadings and documents in <u>Peterson v. Iowa</u>, 17674, Monona County, Iowa, District Court.</u>	<u>P-1755</u>
196...	<u>Copies of pleadings and documents in <u>Lakin v. Iowa</u>, 17737, Monona County, Iowa, District Court.</u>	<u>P-1757</u>
1969	Snap shots by Willis Brown.	P-2656 thru P-2666 P-2709 P-2711 P-2715
5-26-65	<u>Copy of Quit Claim Deed whereby Lakin, et ux conveyed to State of Iowa all interest in certain lands in Blackbird-Tieville Bend area.</u>	<u>D-1056</u>
5-4-65	<u>Copy of Quit Claim Deed whereby Raymond G. Peterson, et ux, conveyed to State of Iowa, all interest in certain lands in Blackbird-Tieville Bend area.</u>	<u>D-1057</u>
	<u>Plat of survey of lands in Blackbird-Tieville Bend area by J. D. Virtue (Sheet 1).</u>	<u>P-2225</u>
	<u>Plat of survey of lands in Blackbird-Tieville Bend area by J. D. Virtue (Sheet 2).</u>	<u>P-2226</u>
	Map of Blackbird-Tieville Bend area.	<u>P-2227</u>

APPENDIX O

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., *et al.*,

Defendants.

**FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
JUN 6 1989**

3:22 pm

**WILLIAM J. KANAK - Clerk
By Patsy Smith, Deputy**

ORDER

This matter comes before the court pursuant to a number of pending discovery motions and a hearing conducted herein on May 2, 1989. In light of discovery disputes that persist without substantial justification, the court concludes that the entry of discovery sanctions is appropriate.

On July 27, 1988, a status conference was held in Sioux City at which the court inquired as to what discovery, if any, remained prior to the resolution of this matter. At that time, counsel for the plaintiff indicated that the plaintiff was prepared to designate its trial experts. Following the hearing, written discovery requests were propounded by the defendants to the plaintiff. On August 29, 1988, the Honorable Edward J. McManus enlarged the time for responding to all pending discovery requests. The time was enlarged until September 26, 1988.

The plaintiff did not respond to the discovery requests but filed a motion for a stay of all discovery proceedings on September 27, 1988. This motion was denied by order dated January 26, 1989. Further, in that order, the court granted motions to compel answers to pending interrogatories and requests for production of documents. In addition, the court ordered the plaintiff to designate expert witnesses in full compliance with *Fed. R. Civ. P. 26 (b)(4)(A)* on or before April 1, 1989.

At the hearing conducted on May 2, 1989, the court determined that the plaintiff had not designated the experts in compliance with the court's order of January 26, 1989. Again, the court ordered answers to all pending discovery requests on or before May 15, 1989 and further required the plaintiff to designate experts in full compliance with *Rule 26(b)(4)(A)* on or before May 15, 1989.

The plaintiff has responded to interrogatories but has not answered the interrogatories concerning any damages that it has sustained. Further, experts have not been designated except for the plaintiff's statement that it intends to rely on the same evidence that is in the record from the prior trial together with additional evidence to rebut that to be introduced by the defendants.

At the May 2, 1989 hearing, the court entered the following orders:

1. The court denied plaintiff's February 2, 1989 motion for reconsideration. (Docket Number 197)

2. The court rendered moot the motion for a clarification filed February 9, 1989. (Docket Number 198)

3. The court rendered moot the State of Iowa and Iowa Department of Natural Resources' motion for reconsideration filed February 14, 1989 insofar as it requested a date certain for the plaintiff's response to its discovery requests. (Docket Number 201)

4. The court required plaintiff to answer pending discovery requests and thereby granted defendant Agricultural and Industrial Investment Company's motion to compel discovery filed February 27, 1989. (Docket Number 203)

5. The court granted defendants' motions for additional time to designate expert witnesses resolving requests filed herein on April 27, 1989, April 28, 1989, May 1, 1989, and May 2, 1989. (Docket Numbers 227, 228, 229, 231, 232, 233, and 234)

By motions dated April 19, 1989 and May 16, 1989, the plaintiff has filed requests for pre-trial conferences to discuss discovery. Ordinarily, the court is anxious to participate in such conferences. However, the plaintiff has failed to provide discovery despite old requests pending from the defendants and court orders requiring answers. The plaintiff can accomplish the objectives identified in these motions by informally meeting with the defendants. These motions are denied.

On January 26, 1989, the court reserved ruling on a motion for sanctions for plaintiff's failure to abide by discovery orders. Since then, motions to dismiss as a discovery sanction have been filed on April 21, 1989 by Agricultural & Industrial Investment Company, on April 7, 1989 by defendants Wilson, Lakin and Jackson, RGP, Inc. and Peterson, on April 25, 1989 by defendants Edna

Miller and others, on April 25, 1989 by the State of Iowa and the Iowa Department of Natural Resources, on June 1, 1989 by defendants Wilson, Lakin and Jackson, and on June 5, 1989 by defendants RGP, Inc. and Otis Peterson. In these motions, the defendants set forth the history of discovery problems noted by the court above. Further, the motions show the plaintiff's refusal to comply with court orders concerning the designation of expert witnesses. The motions also show the plaintiff's complete failure to answer interrogatories concerning the calculation of damages claimed by the plaintiff.

The court has reviewed the motions to dismiss. The court has considered the standards for dismissal set forth in *Taylor v. City of Ballwin*, 859 F.2d 1330 (8th Cir. 1988); *Farnsworth v. Kansas City*, 863 F.2d 33 (8th Cir. 1988); *Townsend v. Terminal Packaging Co.*, 853 F.2d 623 (8th Cir. 1988); and *Mullen v. Galati*, 843 F.2d 293 (8th Cir. 1988). The court notes that the plaintiff has not answered discovery requests despite specific court orders. Instead, it appears to rely on the filing of additional motions to reconsider and motions to stay rather than comply with court orders. Nothing has persuaded the plaintiff to respond to these court orders. Sanctions are appropriate.

This court concludes that the appropriate sanction is found within *Fed. R. Civ. P.* 37(b)(2)(B). This *Rule* provides that the court may enter:

An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; . . .

In this case, the plaintiff has failed to designate expert witnesses and will not designate expert testimony in addition to that which was presented at the first trial. Accordingly, the plaintiff shall be limited to the expert opinions given at the first trial as a sanction for failure to designate additional expert testimony. Further, in light

of the plaintiff's failure to provide any discovery on the issue of damages, the plaintiff shall be prohibited from introducing evidence on the issue of damages at trial. The court has considered less drastic sanctions and finds none that will cure the prejudice inuring to the defendants as a result of plaintiff's failure to provide discovery. However, the court concludes that prejudice to the defendant can be cured by imposing the foregoing sanctions without completely dismissing this action.

Upon the foregoing,

IT IS ORDERED

1. The pending motions for discovery sanctions are granted as noted above.
2. Plaintiff's requests for a pre-trial discovery conference are denied.

June 6, 1989.

/s/ John A. Jarvey

John A. Jarvey, Chief Magistrate
UNITED STATES DISTRICT COURT

APPENDIX P

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., *et al.*,

Defendants.

**EMERGENCY MOTION
REQUESTING IMMEDIATE CONSIDERATION OF
THE JUNE 6, 1989 ORDER**

Plaintiff Omaha Indian Tribe refers to the Order entered on June 6, 1989 by the Honorable James A. Jarvey, Chief Magistrate, and received by Plaintiff Tribe on June 9, 1989, in which it is declared, it is believed in serious error, that:

The motions show the plaintiff's refusal to comply with court orders concerning the designation of expert witnesses. . . .¹

Continuing, it is stated that:

In this case, the plaintiff has failed to designate expert witnesses and will not designate expert testimony in addition to that which was presented at the first trial.²

¹ June 6, 1989 Order, p. 4.

² *Idid.*, p. 5.

Following that statement, it is ordered:

Accordingly, the plaintiff shall be limited to the expert opinions given at the first trial as a sanction for failure to designate additional expert testimony.³

I.

From the above-quoted excerpts, it is evident that this Court has proceeded upon the conclusion that Plaintiff Tribe has not designated its expert witnesses and has not expressed an intention to offer additional complete evidence respecting Monona and Mission Bend lands, TRACTS II and III.

It is respectfully urged to this Court that the conclusion is in error. On May 15, 1989, Plaintiff Omaha Indian Tribe, as ordered by this Court, answered all of the interrogatories, with the exception of those pertaining to damages, which had been served upon it. As part of those responses, Plaintiff Tribe submitted a complete list of Tribe's expert witnesses, together with an explicit statement as to the scope of their testimony. A copy of that list of witnesses is attached.

II.

BLACKBIRD BEND MEANDER LOBE, TRACT I

There was filed with this Court on May 16, 1989, a copy of the answers to interrogatories served by Plaintiff Tribe upon Defendant Wilson, *et al.* Attached to those answers was the list of expert witnesses and the scope of their testimony. That testimony pertained to the lands within the Blackbird Bend Meander Lobe but outside the Barrett Meander Line. Virtually identical answers to interrogatories were served upon Defendants Iowa, Sorenson, and

³ *Ibid.*

presentation of the river morphology which is the dominant feature of the evidence to be offered. In regard to the river morphology, Plaintiff Omaha Indian Tribe refers to the fact that there was summarized in detail in its answers to the interrogatories the entire history of the movements of the Missouri River respecting TRACTS I, II, and III. An explanation of that river morphology at the pre-trial conference would probably have been most helpful to the Court and to all parties.

VIII.

IN ERROR THIS COURT STATES:

“... PLAINTIFF ... WILL NOT DESIGNATE EXPERT TESTIMONY IN ADDITION TO THAT WHICH HAS PRESENTED AT THE FIRST TRIAL”

This Court in its June 6, 1989 Order has declared that:

“... experts have not been designated except for plaintiff’s statement that it intends to rely on the same evidence that is in the record from the prior trial together with additional evidence to rebut that to be introduced by defendants.”⁴

That statement is contrary to fact.

Subsequently, it is stated by this Court that Plaintiff Tribe:

... will not designate expert testimony in addition to that which was presented at the first trial.⁵

Again, that statement is in error.

IX.

The statements quoted above are, it is respectfully urged, contrary to the record and devastating to Plaintiff Tribe

⁴ *Ibid.*, p. 2.

⁵ *Ibid.*, p. 5.

for it is upon the basis of those statements that this Court has declared harshly that Plaintiff Tribe "... shall be limited to the expert opinions given at the first trial as a sanction for failure to designate additional expert testimony."⁶

Consequence of that sanction might be construed as precluding Plaintiff Tribe from offering evidence respecting Plaintiff Tribe's claimed title to lands in Monona and Mission Bends, TRACTS II and III.

X.

Plaintiff Tribe, in answering Defendant Agricultural's Interrogatory No. 3 set out with specificity both the expert evidence and the names of the expert witnesses to testify respecting the entire history of river movements in the TRACT II and III areas.⁷ That evidence is mostly assuredly "additional expert testimony" and the main thrust of Plaintiff Tribe's claim to title in Monona and Mission Bends TRACTS II and III. It is impossible to perceive how any party litigant could do otherwise than embrace—as a full disclosure of Plaintiff Tribe's claims—the above response to Interrogatory No. 3. It necessarily is presumed that the depositions will be directed to that most critical phase of Tribe's evidence.

XI.

In the response to the interrogatories served by Defendants Wilson, *et al.*, Plaintiff Tribe, in its answer to Interrogatory No. 6, spelled out in infinite detail the "additional expert testimony" which Plaintiff Tribe will offer in regard to the Blackbird Bend Meander Lobe. That testimony is, of course, merely repetitious of the comprehen-

⁶ *Ibid.* (Emphasis supplied).

⁷ See answer to interrogatory 3, Defendant Agricultural.

sive and precise proof offered by Plaintiff Tribe in the original trial on the merits involving the 6390 acres of the Blackbird Bend Meander Lobe which totally encompasses the much smaller area within the "imaginary" Barrett Meander Line.⁸ Any question that Plaintiff Omaha Indian Tribe presented Defendants Wilson, *et al.*, and all other claimants *outside* the Barrett Meander Line within the Blackbird Bend Meander Lobe with "additional expert testimony" respecting the lands in question is removed by Defendant Wilson's *et al.*, motion for summary judgment with memorandum in support in which there is chronicled that "additional expert testimony" which was derived from Plaintiff Tribe's answers to Defendant Wilson's *et al.*, interrogatories.⁹

XII.

TRIBE'S REQUEST FOR PRE-TRIAL CONFERENCE DENIED

Plaintiff Tribe assiduously responded to this Court's May 2, 1989 Order requiring answers to interrogatories on May 15, 1989, and otherwise conformed to this Court's explicit Orders. In withholding response to the interrogatories pertaining to damages, Plaintiff Tribe legitimately requested to be relieved from answering those interrogatories, did so in a timely fashion, and has pending in regard to those damage questions a motion for reconsideration. It is strongly urged that the June 6, 1989 Order was totally premature in view of the Tribe's Motion for Reconsideration on the issue of damages.

XIII.

In requesting this Court to call a pretrial conference and actively to participate in that pre-trial conference,

⁸ See answers to Defendant Wilson's *et al.*, interrogatories attached to Plaintiff Tribe's May 16, 1989 motion for a pre-trial conference.

⁹ Motion for Summary Judgment, p. 1, para. 4); Memorandum in Support, p. 3., para. I.

Plaintiff Tribe was anxious to expedite the trial on the merits in these proceedings. There are grave limitations to the discovery processes—interrogatories and depositions—which can only be rendered fully effective by in-depth pretrial conferences at which both the areas of agreement and disagreement can be adequately defined. For those reasons, Plaintiff Tribe again requests this Court to reconsider its denial of the pre-trial conference.

PENDING MOTION FOR RECONSIDERATION RESPECTING ISSUE OF DAMAGES

This Court, in its June 6, 1989 Order, declares:

... plaintiff's complete failure to answer interrogatories concerning the calculation of damages...¹⁰
[Plaintiff Tribe] shall be prohibited from introducing evidence on the issue of damages at the trial.¹¹

Prior to the receipt of this Court's June 6, 1989 Order containing the quoted excerpts set forth above, Plaintiff Tribe had forwarded for filing Plaintiff Tribe's "Motion for Reconsideration of June 2, 1989 Order"—which denied Plaintiff Tribe's motion to sever the issue of damages—until there had been determined the issues respecting (1) title and (2) acreage. As stressed in Tribe's Motion for reconsideration of the June 2, 1989 Order, this Court severed the issue of damages in the trial on the merits for precisely the same reasons. Additionally, it was stressed in that motion that response has never been made to Plaintiff Tribe's interrogatories respecting the source of title of each of the Defendants in TRACTS I, II and III.

None of those Defendants deraigns title from patents issued by United States of America but rather relies upon accretions to the Iowa riparian bank as a source of title.

¹⁰ Order, p. 4.

¹¹ *Ibid.*, p. 5.

Only by an apportionment of those accretions is it possible to determine the acreages which those "squatter" Defendants actually occupy.

Equally important to Plaintiff Tribe in the establishment of damages are the interrogatories relating to the "improvements" and sources of funds used in the alleged improvements to the lands they now occupy. Those factors have far-reaching consequences as to the issue of damages which cannot be assessed without knowledge of the nature and extent of improvements claimed by Defendants.

Plaintiff Omaha Indian Tribe has been subjected to vehement attacks by the "squatter" Defendants in regard to responding to interrogatories while critical issues were pending before both the Appellate court and the Supreme Court. Plaintiff Tribe has now responded to all interrogatories. This Court is requested to require Defendants to answer the interrogatories served upon them June 13, 1979.

CONCLUSION

Plaintiff Omaha Indian Tribe emphasizes to this Court that if the sanctions imposed result in (1) no further discovery—pre-trial conference, depositions or otherwise—and (2) precludes Plaintiff Tribe from offering evidence respecting its claim to title in the Monona and Mission Bends, TRACTS II and III, this Court's explicit declaration to that effect is essential.

Wherefore, Plaintiff Omaha Indian Tribe,

RESPECTFULLY PRAYS THIS COURT

1. To vacate the June 6, 1989 Order, thus permitting Plaintiff Tribe and Defendants to conclude the discovery processes within the constricted time limit ordered by this Court; or

2. Alternatively to clarify with specificity the full import of that order as intended by this Court.

Respectfully submitted,

Dated: June 12, 1989

/s/ William H. Veeder

William H. Veeder
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for
Omaha Indian Tribes

APPENDIX Q

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT CO., et al.,

Defendants.

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
SEPT 29 1989
11:50 am
WILLIAM J. KANAK - Clerk
By Patsy Smith, Deputy

ORDER

This matter is before the court on plaintiff's September 12, 1989, resisted Motion for Change of Venue, and plaintiff's September 20, 1989, unresisted Motion for Reconsideration of Magistrate Jarvey's orders of June 6, 1989, and September 13, 1989. Ruling reserved on motion to change venue. Motion to reconsider granted.

* * * * *

Motion to Reconsider

While the Tribe captions this motion a "... Motion to Reconsider ...," it is in fact an appeal of the Magistrate's order of September 13, 1989. On September 13, 1989, the Magistrate declined to change his order of June 6, 1989, which 1) prohibited the Tribe from introducing any evidence of damages at trial as a sanction for the Tribe's failure to conduct discovery on damages, and 2) with respect to the entire case involving all three bends, limited the Tribe to the expert testimony given at the first trial as a sanction for the Tribe's failure to designate additional expert testimony.

So far as is relevant here, the Tribe in its appeal only argues the issue of whether it should be entitled to present additional expert testimony. In support, the Tribe urges that it complied with the Magistrate's order by serving upon all parties its "Motion ... For Pre-trial Conference to Expedite Discovery Respecting Tract I Blackbird Bend Meander Lobe," filed May 16, 1989, to which the Tribe attached a list of witnesses and answers to interrogatories.

Upon review, the court completely agrees with the Magistrate's conclusion that this purported designation fails to provide 1) any meaningful statement of opinions and facts on which the experts are expected to testify, and 2) a summary of the grounds for each opinion. The Tribe has violated both the letter and the spirit of FRCP 26(b)(4). Nevertheless, the Tribe did disclose the names of its experts, and it is the court's view that the defendants are familiar enough with this litigation that they will not be severely prejudiced if the Tribe's experts are permitted to testify. Moreover, at this point and on this record, the court is reluctant to enter an order that will essentially foreclose the Tribe from going forward with a large part of its case. Accordingly, in the interest of justice the Tribe shall be permitted to put on the experts listed in its aforementioned motion of May 16, 1989.

Final Pre-trial Order

On August 18, 1989, the Magistrate reset the final pre-trial conference and ordered the parties to submit their proposed final pre-trial order by not later than September 1, 1989. As noted by the Magistrate at the final pre-trial conference held on September 8, 1989, and in his order of September 13, 1989, the Tribe completely failed to submit an acceptable or timely pre-trial order in the standard form required by this court and as set forth in the Magistrate's earlier order of June 9, 1989. The Tribe was then ordered to submit a revised proposed final pre-trial order by not later than September 25, 1989. Rather than submitting that document as ordered, the Tribe filed the above referenced Motion to Reconsider, a defacto appeal.

The Tribe's dismal history of noncompliance with the orders of this court is well documented. The Tribe's failure to submit the revised proposed final pre-trial order on time is yet another example of its noncompliance. The mere filing of the Tribe's motion did not stay or extend the deadline, and the Tribe relies upon such tactics at its peril. This matter shall be dismissed with prejudice unless by not later than noon, Monday, October 16, 1989, the Magistrate has received from the Tribe the previously required revised proposed final pre-trial order in the form required by this court. The Tribe is warned that no intervening motion shall operate to stay or extend this deadline.

It is therefore

ORDERED

1. Ruling reserved on plaintiff's motion to change venue. Plaintiffs shall file its brief and submit its evidence by not later than noon, Tuesday, October 10, 1989. Defendants shall have until Monday, October 16, 1989, within which to file any reply.

2. Plaintiff's motion to reconsider granted. The Tribe may present expert testimony in accordance with the text of this order.

3. This matter is dismissed in its entirety with prejudice unless by not later than noon, Monday, October 16, 1989, the Magistrate has received from the Tribe a revised proposed final pre-trial order in the form required by this court.

September 29, 1989.

/s/ Edward J. McManus

Edward J. McManus, Judge
UNITED STATES DISTRICT JUDGE

APPENDIX R

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., *et al.*,
Defendants.

**MOTION REQUESTING THIS COURT TO DECLARE
THAT THE MAY 29, 1987 JUDGMENT IS *RES*
JUDICATA AGAINST DEFENDANTS RESPECTING THE
TITLE TO LANDS OUTSIDE THE BARRETT LINE
WITH MEMORANDUM IN SUPPORT AND RESPONSE
TO DEFENDANTS' PENDING MOTIONS TO DISMISS
AND OBJECTIONS TO INTERROGATORIES AND
REQUESTS FOR DOCUMENTS**

Plaintiff Omaha Indian Tribe respectfully moves this Court to enter an Order declaring that the May 29, 1987 Final Judgment and Decree is *res judicata* against the Defendants in regard to title to the lands outside the Barrett Survey Line and to determine all other issues hereafter referred to and for which relief is prayed upon the following grounds and for the following reasons:

INTRODUCTION

This Court could not have entered the May 29, 1987 Final Judgment and Decree quieting title to Plaintiff Omaha Indian Tribe to 1900 acres of land within the Bar-

rett Meander Line without first having determined that those lands were not accretions to the Iowa riparian bank, as contended by Defendants in the trial on the merits. It is undenied and undeniable that the single most important issue to the Defendants in the trial on the merits involved the question of whether the lands both *inside* and *outside* the Barrett Meander Line were accretions to the Iowa riparian bank. The Court of Appeals for the Eighth Circuit underscores that fact by this explicit denial of Defendants claims to title to lands *inside* and *outside* the Barrett Meander Line:

The basic finding essential to the defendants' case is the trial court's statement that 'the original Omaha Indian Reservation land within the 1867 Barrett Survey has subsequently been washed away by the Missouri River . . . and that at the same time new land was added to the Iowa riparian land . . . by the gradual process of deposition *within the Blackbird Bend area*. . . .'¹

That fact is graphically displayed on Plate II of *OMAHA I*, set forth below, which clearly establishes the undeniable fact that all of the issues pertained to the Blackbird Bend Meander Lobe, outer extremities of which are the abandoned stream beds of the 1875 Missouri River and the abandoned bed of the 1912 Missouri River, which abandoned stream beds are bounded to the east by the "... Iowa riparian land."² That decision by the Appellate Court is a final determination predicated upon the fact that the trial on the merits participated in by the consent of all parties and with the full approval of this Court was not and could not be constricted to this Court's *sua sponte*

¹ *Omaha v. Wilson*, 575 F.2d 620, 639 (CA 8, 1978). (Emphasis supplied).

² *Ibid.*, p. 627, 639.

order which purported to limit the issues in the trial on the merits to the lands within the Barrett Survey Line.³

OMAHA INDIAN TRIBE, TREATY OF 1854, ETC. v. WILSON

Case No. 573 F.2d 629 (1978)

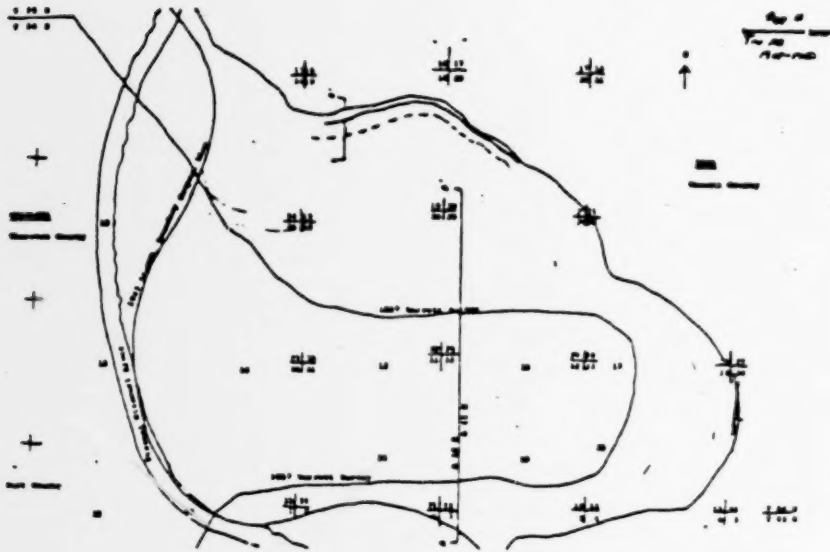


PLATE III.

Sketch of river against the northerly high bank.

As will be reviewed in specific detail, the principles of *res judicata* deny Defendants the opportunity to retry the case which was decided against them. Plaintiff Omaha Indian Tribe denies that this Court's Order of December 18, 1987 could amend or in any way change its May 29, 1987 Judgment or in any sense diminish the impact of the *res judicata* consequences of that Judgment as it pertains to the title to the lands inside and outside the Barrett Survey Line. From that December 18, 1987 Order, this statement is taken:

³ See *Infra.*, at p. 9.

It is clear that much of the evidence introduced in the consolidated cases will be probative of river movement outside the Barrett Survey area, and within Blackbird Bend. Nonetheless, trial of the consolidated cases *only* resolved how the river moved across the Barrett Survey area and the evidence was relevant and probative only insofar as it shed light *on that area*. The court has repeatedly held that the trial and the court's findings of fact and conclusions of law pertain *only* to the Barrett Survey area.⁴

Plaintiff Omaha Indian Tribe challenges that conclusion and likewise requests this Court to reconsider its statement that the only issues resolved were those involving the lands within the Barrett Survey Line. Contrary to the conclusions contained in the December 18, 1987 Order, this Court's statement establishes beyond controversy that the issues to be resolved were not and could not be limited to the Barrett Survey Line:

The question before this Court for resolution is . . . *whether the land now within the Barrett Survey line was formed as the result of accretions to the Iowa riparian land.* . . .⁵

For the Defendants to succeed in their claim to title to the Barrett Survey land, the Court of appeals declared that it was essential to Defendants' case to prove that the Barrett Survey land and the lands outside the Barrett Line were accretions to the Iowa riparian bank. It is wholly improper and contrary to fact to state that the May 29, 1987 Judgment could have been entered quieting title in Plaintiff Tribe to the 1900 acres within the Barrett Survey Line without having decided that the lands *outside* of that

⁴ December 18, 1987 Order, p. 5.

⁵ *United States v. Wilson*, 433 F.Supp. 67, 71 (U.S.D.C.W.D.Iowa.D. 1977). (Emphasis supplied).

line were not accretions to the riparian bank, all as declared by the Court of Appeals and quoted above.⁶

**PRINCIPLE OF RES JUDICATA PRECLUDE A RETRIAL
OF TITLE TO LANDS OUTSIDE THE BARRETT LINE**

**The Pleadings in Trial on the Merits Not Constricted
to Barrett Survey Line**

Plaintiff Omaha Indian Tribe properly pleaded in *Omaha v. Agricultural* . . . its single claim to title to 6390 acres in the Blackbird Bend Meander Lobe and petitioned this Court to quiet Tribe's title to those 6390 acres of land.⁷ Each of the Defendants placed in issue by their counter-claims to title against Plaintiff Tribe by pleading in error that all of the Blackbird Bend Meander Lobe was washed away and ceased to exist, extinguishing Plaintiff Tribe's title to those lands and (b) likewise pleaded, in error, *that the Blackbird Bend Meander Lobe, including the lands within the Barrett Meander Line, was totally replaced by accretions to the Iowa riparian bank of the Missouri River.*⁸

* * *

Discovery at this Juncture Is Simply Harassment

Defendants and the attorneys for the Department of Justice are circling Plaintiff Omaha Indian Tribe like a

⁶ *Supra.*, at p. 2.

⁷ C.R. No. 1, C 75-4067, October 6, 1975 Complaint to Quiet Title.

⁸ (1) Defendant State of Iowa asserted that the land claimed by Plaintiff Tribe "... was eroded, washed away and ceased to exist. . . ." and that Plaintiff Tribe's claim to title "... was extinguished thereby." (Answer of Defendant State of Iowa, Consolidated cases, Answer C.R. 46); (2) Wilson, Jackson, and Lakin asserted that all of the Blackbird Bend Meander Lobe claimed by Plaintiff Tribe "... was washed away . . . and ceased to exist . . . Land was thereafter added by the process of accretions to the left or Iowa bank. . . . All of said accretions land upon its coming into existence became the property of the riparian owners on the Iowa bank. . . ." (Consolidated cases, Answer C.R. No.

fatally wounded animal waiting for it to drop. Defendants believe that by forcing a needless retrial, Plaintiff Tribe can be driven out of the litigation and their status as "squatters" can be legitimized.

Quite obviously the vast number of interrogatories and the demands for documents are not tendered in good faith. Defendants have before them the entire record of the trial on the merits. Indeed, they participated in formulating that record, and are fully aware of all the expert testimony respecting river morphology. Moreover, during the course of the trial they were served copies of all the maps and plates prepared by Plaintiff and received into evidence by this Court, together with numerous explicit rulings on that evidence by this Court in the long and complex trial on the merits to which they now refer.

Premature nature of the discovery process undertaken by Defendants is best evidenced by this Court's declaration that: "It is clear that much of the evidence introduced in the consolidated cases will be probative of river movement outside the Barrett Survey area, and within Blackbird Bend."⁴¹

Assuming, *arguendo* only, that there will be retrial of the case, Plaintiff Tribe respectfully petitions this Court to suspend all discovery processes until this Court has determined from the comprehensive record of the trial on the merits the "evidence" it perceives to be "probative" and further to require the parties to exhaust the record of the trial on the merits which is the best source of information respecting Tribe's witnesses, what they testified to, and their evidence in support of their conclusions.

78, Answer, dated February 5, 1976, para 8); (30 Answer of the R.G.P., Inc. and Otis Peterson is identical with answer of Defendants Wilson, Jackson, Lakin as to affirmative claim to title. (Consolidated cases, Answer C.R. No. 76, dated July 15, 1976).

⁴¹ Order, December 18, 1987, p. 1.

WHEREFORE, Plaintiff Omaha Indian Tribe,
RESPECTFULLY PRAYS THIS COURT:

1. To declare that the May 29, 1987 Judgment is *res judicata* against the Defendants in regard to their claims to title to lands in the Blackbird Bend Meander Lobe which are outside of the Barrett Survey Line;

2. To declare that this Court and all of the parties in the "consolidated cases" consented to the full trial on the merits respecting the entire Blackbird Bend Meander Lobe, of which the Barrett Survey land is but a part;

3. To declare that this Court has a "duty" and an "obligation" to hear and try Plaintiff Tribe's fraud charges against the Department of Justice Attorneys Flint, Hultman, and Clear;

4. To deny the Defendants' motions to dismiss Plaintiff Tribe's complaint until all relevant issues have been determined with particular reference to the fraud charges which gave rise to the initial sanctions;

5. To suspend all sanctions against Plaintiff Tribe and Counsel until the controlling issues of *res judicata* and fraud have been finally resolved;

6. To suspend all discovery process until the propriety for a retrial has been finally determined by the Supreme Court, if necessary, and further to determine what evidence in the record is "probative," assuming a retrial;

7. And for such other and additional relief that may be proper under the circumstances.

Respectfully submitted,

/s/ William H. Veeder

William H. Veeder

818 18th Street, N.W. #920

Washington, D.C. 20006

[202] 466-3890

Attorney for

Omaha Indian Tribe

Dated: September 26, 1988

APPENDIX S

ORIGINAL

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

Civil No. 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL AND INDUSTRIAL INVESTMENT
COMPANY, et al,

Defendants.

PRELIMINARY PRETRIAL HEARING

APPEARANCES

MR. WILLIAM H. VEEDER, Attorney at Law, 818
18th Street, N.W., Washington, D.C., appearing on behalf
of the plaintiff.

MR. PETER J. PETERS, Attorney at Law, 233 Pearl
Street, Council Bluffs, Iowa, appearing on behalf of the
defendants RGP, Inc., Otis Peterson, and Donald R. Rupp.

MR. THOMAS R. BURKE, Attorney at Law, 10306
Regency Parkway Drive, Omaha, Nebraska, appearing on
behalf of the defendants John R. Wilson and Harold Jack-
son.

MR. DONALD J. BURESH, Attorney at Law, II Guar-
antee Centre, Suite 325, 8805 Indian Hills Drive, Omaha,
Nebraska, appearing as counsel on behalf of the defendants
Charles and Florence Lakin.

MS. ELIZABETH M. OSENBAUGH, Deputy Attorney General, and MR. JOHN P. SARCONI, Assistant Attorney General, Hoover State Office Building, Des Moines, Iowa, appearing as counsel on behalf of the State of Iowa and the Iowa Department of Natural Resources.

MR. WILEY MAYNE, Attorney at Law, Suite 400, Home Federal Building, Sioux City, Iowa, appearing as counsel on behalf of the defendants Edna Boulden Miller, et al.

* * *

getting anything today, we have designated our expert witnesses as well, so—

MR. VEEDER: But you haven't made any statement of your contingents.

MR. SARCONI: Oh, we have. I think that's clear from what we filed.

MR. VEEDER: Okay. Let's go this way, then. That's the only thing I can recommend now based on the material that we have.

Pete, you join with Mr. Mayne?

MR. PETERS: This is Peters, and the problem that I perceive today is that the Court wants us to file by the 1st of September a proposed pretrial order—

MR. VEEDER: Right.

MR. PETERS:—in the form that he has attached to his order. Now, today is the 22nd of August, and we have come here today—when I say we, I'm talking about Wilson, Lakin, Jackson, RGP, Inc., and Peterson. And I also have, although I have not delivered to you yet, a suggestion on behalf of Rupp, but I thought I would take that up—

MR. VEEDER: I think it's better to have 2 and 3 separate.

MR. PETERS: That's the reason I didn't burden you with that at this point. But if we can't agree on anything that is undisputed, any facts that are undisputed today, how are we going to agree on those facts by the 1st of September?

MR. VEEDER: Peter, I—I don't think there can be an agreement. I received—I want the record to show this very clear. I received the contentions by your assignment Mr. Buresh in regard to the facts as you people say, Lakin, Peterson, Rupp, RGP. You come in and say this, that you are asserting that the 1879 river is the controlling stream in regard to the litigation. You say that the Blackbird Bend is a bar in the stream, and we're right back where we were when you offered your original findings of fact.

And I knew when I received that we'd have to go through this kind of a seance, or whatever you want to call it, in which we would say, "Present to the Court your position; we'll present our position. You proceed on the basis there is no 1879 channel; we say that that's the most critical single phenomenon in the litigation," so this is where we are.

And I think the only way to do it is to let the Court comprehend that there is no agreement on the basic facts of river morphology. That's my view. And that was the view I came up with as soon as I saw your responses to our requests for action.

MR. PETERS: The problem that that position presents is it puts you, I believe, in a position of bad faith with the Court because we've all gathered here, come from many places, far and distant—

MR. VEEDER: I've come the farthest.

MR. PETERS: Of course you have. But you have nothing to submit to us as proposed—

MR. VEEDER: Facts.

MR. PETERS:—facts that are undisputed. Now, we have very carefully drafted our proposals as regards the things about which we believe there is no factual dispute. We haven't put anything in there about the 197—or '69 river or 1879 river or anything of those kinds.

MR. VEEDER: Okay.

MR. PETERS: What you're mixing up in my view is you're talking about what your theory of the case is as opposed to what our theory of the case is. And what the Court wants us to do is to tell him what facts there are that are not in dispute.

And the first thing we say in our statement of facts is that, "The plaintiff Omaha Indian Tribe is now a corporate body organized and approved under the laws of the United States, with a constitution and bylaws governing its membership. Its governing body is known as the Tribal Council." Now, how in the hell can you dispute that?

MR. VEEDER: Pete, I move to strike your four-letter word because it's offensive. I'm going to read to you the paragraph that's—

MR. PETERS: Let's start with paragraph A that we proposed. Do you have any problem with that?

MR. VEEDER: I have no question that Omaha is there, and it's not denied that Iowa is a state in the union. But let me read to you where we are, because our interests are getting the uttermost folly. F, "The outermost limit of the Blackbird Bend area, paren, within which the 1867 Barrett Survey located the right bank meander line of the Missouri River to the west of which lay the Omaha Reservation in 1867, is defined as the easterly and northerly high banks."

When I read that, I knew that we were going to contest—I knew that there was no way that you were going to back off from the position you took in the original case.

Now, here is my feeling, you understand where I am on this. I'll submit to you my facts. You submitted to us your facts. We'll present them to the Court and say, "There has never been agreement among us on this matter, and this is the way the matter stands in the record."

Now, I did tend to you a full list of exhibits. I tended the basis upon which they're going to be received. I see no reason for us even contesting about the Omaha Tribe having a treaty; but from my standpoint, I'm—

MR. PETERS: Well, I just don't see how we can go forward today in any meaningful way if we do not know the facts upon which the parties are willing to agree are undisputed. That's what the judge wants us to do. Once we can agree to those kinds of things, then certain exhibits may or may not become relevant, certain exhibits may or may not be objected to. Until we know what the undisputed facts are, how can we put together this proposed final pretrial order?

MR. VEEDER: I've said to you there is no disagreement in regard to the Omaha Indian Tribe being incorporated. There's no question in regard to the State of Iowa being a state in the union. Our great problem, the reason I'm interested in having this agreement come forward is to see the morphology of the river, that is the critical thing in Blackbird Bend. And it is obvious that there's not a single statement that you made to us concerning which we can have agreement:

MR. PETERS: But you submitted nothing to us about that subject upon which you want us to agree, so how do we know?

MR. VEEDER: I haven't asked you to agree to a cock-eyed thing. I said what I think you ought to do is submit this to the Court. I'll submit my statement to the Court. And it's not the first time that people couldn't agree on

anything. I'll just let it go that way, Pete. I never agreed on anything in 13 years. We'll just go ahead that way.

MR. PETERS: So you're saying to us now today that you are not willing to sit down and go through the proposal submitted by Wilson, Lakin, Jackson, RGP, Inc., and Peterson and by Mr. Mayne on behalf of Miller, et al, to see what of those proposed factual statements are in dispute or not in dispute; is that what you're saying?

MR. VEEDER: If you want to sit down and go through it, the plaintiff Omaha Tribe is now a corporate body organized, approved under the laws of

* * *

APPENDIX T

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

**DEFENDANTS STATE OF IOWA AND
IOWA DEPARTMENT OF NATURAL RESOURCES'
MOTION IN LIMINE**

Defendants State of Iowa and Iowa Department of Natural Resources respectfully request the Court to enter an order prohibiting plaintiff, its counsel, or its witnesses from communicating to the jury in any way including but not limited to reference in voir dire, opening statement, during the trial of this matter and closing arguments, to its alleged fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan Hultman or any reference to a "constricted complaint" or any other references which either directly or indirectly relate to its alleged fraud claim and state as follows:

1. The history of this case demonstrates that on November 7, 1985, plaintiff filed in the consolidated cases a motion (filing 589) to have certain Justice Department Attorneys and then United States Attorney Evan Hultman disqualified from further representation of the Tribe al-

leging that these attorneys ?? in "fraud" against the Omaha Indian Tribe.

2. On January 9, 1986, the Tribe filed in the consolidated cases, a Motion for Summary Judgment (filing 598) against the above mentioned attorneys based on its alleged fraud claim.

3. On February 21, 1986, the court entered an order overruling both motions determining that the motions were frivolous and sanctions were imposed against the Tribe's counsel ?? the motion for summary judgment.

4. Since this court's ruling of February 21, 1986, the ?? raised this frivolous claim on many occasions without success. The Court of Appeals entered an order on July 18, 1986, dismissing the Tribe's petition for writ of mandamus based on the alleged fraud claim as frivolous and without merit. Sanctions ?? at that time against the Tribe and its counsel. In ?? *Indian Tribe*, Petition No. 86-1717 (July 15, 1986). In ?? *Indian Tribe v. Jackson*, 854 F.2d 1089, 1092, n.4 (8th Cir. ?? the Court of Appeals refused to allow oral argument on ?? issue.

5. Despite rulings from this Court and the Court of ?? Tribe has submitted a proposed pretrial order in ?? till contends it is entitled to have a jury determine ?? issue. No basis exists to support the Tribe's claim in ?? and no reason exists to allow the Tribe to inject ?? and meritless matters into these proceedings. Moreover the United States and its attorneys and former attorney are not parties to these proceedings.

6. Since the court has previously determined the fraud issue to be frivolous and without merit the Tribe should be precluded from burdening the jury with any matter which in any way relates to its alleged fraud claim.

7. Further the alleged fraud of Justice Department attorneys in signing a complaint "constricted" to the Barrett Survey within Blackbird Bend is irrelevant to the

merits of this case. The Tribe has been permitted to sue for lands outside the Barrett Survey. The Tribe has not, and cannot, establish that the actions of the Justice Department are material to this litigation. This issue has not been pleaded and is simply scandalous and improper argument which should not be permitted.

8. The "fraud" claim is frivolous as a matter of law. Its injection in this case would only confuse the jury, attack Justice Department attorneys who are not represented in this case, unduly prolong these proceedings, and unfairly prejudice the defendants.

For the above reasons defendants State of Iowa and Iowa Department of Natural Resources respectfully move the Court for an order in limine directed to plaintiff and its counsel ordering plaintiff to instruct its counsel, its witnesses and all agents, employees and representatives to refrain from communicating to the jury in any way the "fraud issue" or the "constricted complaint" issue, including but not limited to voir dire, opening statement, during testimony or in closing argument.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

/s/ Elizabeth M. Osenbaugh
ELIZABETH M. OSENBAUGH
Deputy Attorney General

/s/John P. Sarcone by EMO
JOHN P. SARCONI
Assistant Attorney General
Hoover State Office Building
Des Moines, Iowa 50319
Tel. (515) 281-5351
ATTORNEYS FOR STATE OF IOWA

196a

**(Duplicate of September 29, 1989 Order Appendix Q)
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

**[FILED
Cedar Rapids Hdqtrs Office,
Northern District of Iowa,
Sep 29, 1989,
11:50 am,
William J. Kanak-Clerk,
By Patsy Smith, Deputy]**

ORDER

This matter is before the court on plaintiff's September 12, 1989, resisted Motion for Change of Venue, and plaintiff's September 20, 1989, unresisted Motion for Reconsideration of Magistrate Jarvey's orders of June 6, 1989, and September 13, 1989. Ruling reserved on motion to change venue. Motion to reconsider granted.

* * *

Motion to Reconsider

While the Tribe captions this motion a "... Motion to Reconsider . . .," it is in fact an appeal of the Magistrate's order of September 13, 1989. On September 13, 1989, the

Magistrate declined to change his order of June 6, 1989, which 1) prohibited the Tribe from introducing any evidence of damages at trial as a sanction for the Tribe's failure to conduct discovery on damages, and 2) with respect to the entire case involving all three bends, limited the Tribe to the expert testimony given at the first trial as a sanction for the Tribe's failure to designate additional expert testimony.

So far as is relevant here, the Tribe in its appeal only argues the issue of whether it should be entitled to present additional expert testimony. In support, the Tribe urges that it complied with the Magistrate's order by serving upon all parties its "Motion . . . For Pre-trial Conference to Expedite Discovery Respecting Tract I Blackbird Bend Meander Lobe," filed May 16, 1989, to which the Tribe attached a list of witnesses and answers to interrogatories.

Upon review, the court completely agrees with the Magistrate's conclusion that this purported designation fails to provide 1) any meaningful statement of opinions and facts on which the experts are expected to testify, and 2) a summary of the grounds for each opinion. The Tribe has violated both the letter and the spirit of FRCP 26(b)(4). Nevertheless, the Tribe did disclose the names of its experts, and it is the court's view that the defendants are familiar enough with this litigation that they will not be severely prejudiced if the Tribe's experts are permitted to testify. Moreover, at this point and on this record, the court is reluctant to enter an order that will essentially foreclose the Tribe from going forward with a large part of its case. Accordingly, in the interest of justice the Tribe shall be permitted to put on the experts listed in its aforementioned motion of May 16, 1989.

Final Pre-trial Order

On August 18, 1989, the Magistrate reset the final pre-trial conference and ordered the parties to submit their

proposed final pre-trial order by not later than September 1, 1989. As noted by the Magistrate at the final pre-trial conference held on September 8, 1989, and in his order of September 13, 1989, the Tribe completely failed to submit an acceptable or timely pre-trial order in the standard form required by this court and as set forth in the Magistrate's earlier order of June 9, 1989. The Tribe was then ordered to submit a revised proposed final pre-trial order by not later than September 25, 1989. Rather than submitting that document as ordered, the Tribe filed the above referenced Motion to Reconsider, a defacto appeal.

The Tribe's dismal history of noncompliance with the orders of this court is well documented. The Tribe's failure to submit the revised proposed final pre-trial order on time is yet another example of its noncompliance. The mere filing of the Tribe's motion did not stay or extend the deadline, and the Tribe relies upon such tactics at its peril. This matter shall be dismissed with prejudice unless by not later than noon, Monday, October 16, 1989, the Magistrate has received from the Tribe the previously required revised proposed final pre-trial order in the form required by this court. The Tribe is warned that no intervening motion shall operate to stay or extend this deadline.

It is therefore

ORDERED

1. Ruling reserved on plaintiff's motion to change venue. Plaintiffs shall file its brief and submit its evidence by not later than noon, Tuesday, October 10, 1989. Defendants shall have until Monday, October 16, 1989, within which to file any reply.

2. Plaintiff's motion to reconsider granted. The Tribe may present expert testimony in accordance with the text of this order.

3. This matter is dismissed in its entirety with prejudice unless by not later than noon, Monday, October 16, 1989,

the Magistrate has received from the Tribe a revised proposed final pre-trial order in the form required by this court.

September 29, 1989.

/s/ Edward J. McManus

Edward J. McManus, Judge
UNITED STATES DISTRICT JUDGE

APPENDIX U

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION**

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

v.

**AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., et al.,**

Defendants.

FILED

**CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA**

OCT 2 1989

WILLIAM J. KANAK - Clerk

By: _____ Deputy

**PLAINTIFF OMAHA INDIAN TRIBE'S OPPOSITION TO
DEFENDANT IOWA'S MOTION IN LIMINE**

Plaintiff Omaha Indian Tribe—in opposing Defendant State of Iowa's motion in advance of trial respecting the all- pervasive issue of fraud in this retrial of the title to the Blackbird Bend Meander Lobe outside the Barrett Meander Line—alleges and avers as follows:

I.**DEFENDANT STATE OF IOWA PRIME BENEFICIARY
OF THE FLINT-HULTMAN FRAUD SEEKS TO
SUPPRESS ALL REFERENCES TO THAT FRAUD**

The efforts of Defendant Iowa to obtain an order in advance of trial suppressing all references to fraud, which fraud is Defendant Iowa's sole source of title to lands claimed by Defendant Iowa within the Blackbird Bend Meander Lobe, presents this anomaly: Defendant State of Iowa, as one of the States comprising the United States of America, while demeaning itself to benefit from the Flint-Hultman fraud, must not be permitted to demean the integrity of this Court by Defendant Iowa's motion for an order to conceal, cloak, suppress, and distort the undeniable fact that title to lands claimed by Iowa in this retrial stems from the fraud practiced upon Plaintiff Tribe by Defendant Iowa's former Attorney General, Evan L. Hultman.

II.

There is presented this further anomaly: Defendant Iowa requests this Court to prohibit Plaintiff Omaha Indian Tribe, its Counsel and others from communicating the facts respecting the Flint-Hultman fraud to a jury which will be comprised of citizens of Defendant State of Iowa. Most assuredly, if there is no merit to the fraud, as urged by Defendant Iowa in its motion in limine, it would invite—not avoid—a jury comprised of citizens from Iowa to pass judgment upon the facts here involved.

III.**PLAINTIFF OMAHA INDIAN TRIBE, AS DECLARED BY
THIS COURT, HAS NEVER BEEN HEARD RESPECTING
ITS CHARGES OF FRAUD**

This Court on March 9, 1987—in responding to Plaintiff Tribe's repeated charges that the Department of Justice

Attorneys, including Evan L. Hultman, United States Attorney (former Attorney General for Defendant Iowa) had practiced fraud upon Plaintiff Tribe by filing in this Court the "constricted complaint" in *United States v. Wilson*—declared that the Court (1) had not heard and (2) would not hear the fraud charges, and could not permit the fraud "rabbit" to enter this Court.¹

IV.

This Court, moreover, explicitly denied Plaintiff Tribe's request that it enter a finding in regard to the Flint-Hultman fraud. That initial fraud in this Court was practiced by the then United States Attorney Evan L. Hultman who filed the fraudulent and "constricted complaint" in *United States v. Wilson*. Defendant Iowa's great concern over any reference to the forced, fraudulent representation of Plaintiff Tribe by Evan L. Hultman, United States Attorney, stems from the fact that Evan L. Hultman, as former Attorney General for the State of Iowa, had previously obtained for Defendant Iowa the lands title to which Hultman denied Plaintiff Tribe's title in the "constricted complaint." Defendant State of Iowa in its motion—well aware of the consequences if the jury were to hear an expose of the forced, fraudulent representation perpetrated upon Plaintiff Tribe by Evan L. Hultman, United States Attorney—seeks an order from this Court precluding Plaintiff Tribe or its Counsel from referring to:

... former U.S. Attorney Evan L. Hultman or any reference to a 'constricted complaint' or any other references which either directly or indirectly relate to its alleged fraud claim. . . .²

¹ T.R., March 9, 1987, p. 216, ln. 25; p. 217, ln. 1; p. 217, ln. 25; p. 218, ln. 1.

² Defendant Iowa's motion, p. 1, initial para.

V.

Defendant Iowa, while seeking to avoid any reference to its former Attorney General, Evan L. Hultman, likewise petitions this Court to enjoin and restrain Plaintiff Tribe's Counsel and its witnesses from referring to the "... alleged fraudulent representation claim against the United States Department of Justice. . . ." Defendant State of Iowa's reference to the charges of forced, fraudulent representation of Plaintiff Tribe against the United States Justice Department has reference to this undisputed fact:

When Defendants State of Iowa, Lakin, Wilson, and R.G.P., Inc. were apprised of the fact that Plaintiff Tribe, acting by and through its own attorney, was in the process of preparing the present and ongoing case of *Omaha v. Agricultural . . . Wilson, Lakin, Iowa, R.G.P. Inc., et al.*, Attorneys for those Defendants brought political pressure upon the Attorneys in the Departments of the Interior and Justice urging them forthwith to prepare and file—without preparation—the “constricted complaint” in *United States v. Wilson*.

VI.

When Plaintiff Tribe and the employees of the Bureau of Indian Affairs were informed that the Department of Justice, under pressure from the above-named Defendants, was in the process of formulating the “constricted complaint,” representatives of both Plaintiff Tribe and the Bureau of Indian Affairs met with Myles E. Flint and other attorneys in the Department of Justice. Those representatives protested to Myles E. Flint and other attorneys in the Department of Justice who were formulating the “constricted complaint” that Plaintiff Tribe was in the process of preparing its own claim to title to the entire Blackbird Bend Meander Lobe comprised of 6390 acres, in contrast to the 2900 acres claimed by Mr. Flint in the “constricted complaint.”

VII.

Myles E. Flint and other Attorneys in the Department of Justice informed Plaintiff Tribe's representatives and those of the Bureau of Indian Affairs that, irrespective of Plaintiff's objections, they would formulate and file the "constricted complaint" limiting Plaintiff Tribe's claims to 2900 acres encompassed within the nonexistent Barrett Meander Line. Mr. Flint, moreover, stated that they would immediately file the complaint irrespective of the fact that they had made no preparation in regard to their claim. That decision by Mr. Flint creates numerous, critical issues in the ongoing retrial of the title to the lands outside the Barrett Meander Line.

VIII.

By the "constricted complaint" in *United States v. Wilson*, prepared by Mr. Flint and filed by Mr. Hultman, United States Attorney, Messrs. Flint and Hultman (1) constricted Plaintiff Tribe's claims within the Barrett Meander Line to 1937 acres, abandoning Plaintiff Tribe's claims to all of the land outside the Barrett Meander Line totalling 3490 acres and (2) denied Plaintiff Tribe's title to approximately 1000 acres of land within the Barrett Meander Line referred to as "fee patented lands" which Plaintiff Tribe subsequently proved had been totally obliterated and washed away upwards to 50 years antecedent to the occupancy of those lands by squatter Defendants Iowa, *et al.*,

IX.

By placing in issue the "constricted complaint," Defendant Iowa underscores the imperative necessity for the fraud issue to be fully heard in this retrial. Counsel for Plaintiff Tribe met with Myles E. Flint, now Deputy Assistant Attorney General, Lands and Natural Resources Division, advising Mr. Flint that to constrict Plaintiff

Tribe's claim to the Barrett Meander Line would constitute abandonment of title to approximately 3500 acres of land outside that Meander Line. It was stressed, moreover, that the "constricted complaint" would unquestionably "split" the Tribe's claim against Defendants State of Iowa, R.G.P., Inc., Wilson, Lakin, and Sorenson, *et al*, all of whom claimed land both within and outside the Barrett Line.

X.

Mr. Flint's response was both prophetic and disastrous. Mr. Flint declared that the issues outside the Barrett Meander Line—which were and are inextricably interrelated to the issues within the Barrett Line—was a separate case against the last named Defendants. Ignored totally by Mr. Flint was the fact that the Blackbird Bend Meander Lobe was a unitary tract of land. That unitary tract of land was and is comprised of the lands originally meandered by Barrett in 1867 and those lands which accreted to the right or Omaha bank of the Missouri River, creating the full Blackbird Bend Meander Lobe.

XI.

In considering Defendant State of Iowa's request that Plaintiff Tribe, its Counsel, its witnesses, and all others be prohibited from alluding to the "constricted complaint" in *United States v. Wilson*, and all other aspects of the forced fraudulent representation charged by Plaintiff Tribe, this Court is confronted with a legal and, indeed, moral responsibility to hear and determine Plaintiff Tribe's charges of fraud. That statement is predicated upon the following facts: All of the Defendants, State of Iowa, Wilson, Lakin, R.G.P., Inc., Jackson, Peterson and Sorenson in filing their answers and counterclaims did not limit their claims to the lands within the "constricted complaint" but rather affirmatively pleaded their respective claims to title to the *entire* Blackbird Bend Meander Lobe, underscoring

the total impossibility of attempting to sever the lands *within* the Barrett Meander Line from the lands *outside* of that illusory Barrett Meander Line, which lands were and are inseparable, not subject to severance as was attempted by the fraudulent "constricted complaint" in *United States v. Wilson*.

XII.

Plaintiff Tribe, having completed preparation to assert its claim to title to the full 6390 acres, filed its complaint in *Omaha v. Agricultural . . . Wilson, Lakin, Iowa, R.G.P., Inc., Jackson, Peterson, and Sorenson, et al.* Defendants Wilson, Lakin, R.G.P., Inc., and the State of Iowa filed their Answers and Counterclaims against Plaintiff Tribe and asserted their respective titles within the 6390 acres comprising the Blackbird Bend Meander Lobe, as those Defendants had counterclaimed to the "constricted complaint" in *United States v. Wilson*.

XIII.

There is graphically displayed below Plaintiff Tribe's claim to the 6390 acres within the Blackbird Bend Meander Lobe as distinguished from the 1900 acres claimed by Messrs. Flint and Hultman, purportedly on behalf of Plaintiff Tribe, in the "constricted complaint" in *United States v. Wilson*.

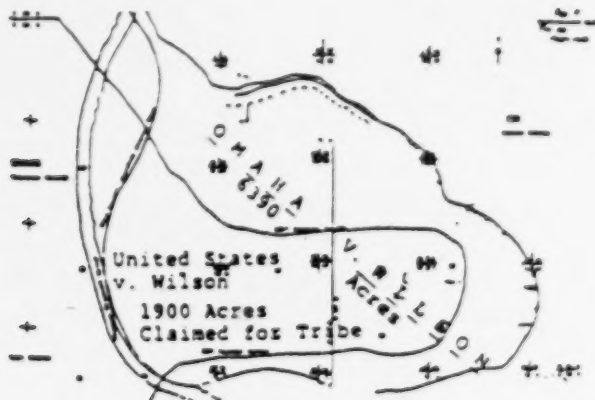


PLATE I

XIV.

Plaintiff Tribe's unvarying resistance to representation by the Attorneys in the Department of Justice has its genesis in these two controlling factors:

(1) Myles E. Flint had formulated the "constricted complaint" at the behest of the Defendants including Defendant State of Iowa, *et al.*, and forwarded the "constricted complaint" to Evan L. Hultman, then United States Attorney, for filing;

(2) Evan L. Hultman, as Attorney General for Defendant State of Iowa, had previously represented Defendant Iowa in State Court litigation entitled *Lakin v. Iowa and Peterson [R.G.P., Inc.] v. Iowa*. Lakin and Peterson in the State Court litigation entered into agreements with Defendant State of Iowa pursuant to which Lakin and Peterson amended their original claims against Iowa to exclude from those claims title to lands which are now claimed by Defendant Iowa against Plaintiff Tribe. By quitclaim deeds, Lakin and Peterson confirmed their concessions of title in the State Court cases to Defendant State of Iowa. In return, Evan L. Hultman, as Attorney General on behalf of Defendant Iowa, disclaimed any interest in and to the lands now claimed by Lakin and Peterson [R.G.P., Inc.]. On the following page there is graphically displayed the division of the entire Blackbird Bend Meander Lobe in which Evan L. Hultman, as Attorney General for Defendant Iowa, divided up substantially all of the Blackbird Bend Meander Lobe among Defendants Iowa, Lakin, and R.G.P., Inc. Defendant Wilson is successor in interest to Defendant Lakin.

XV.

When Myles E. Flint, then Attorney in charge of *United States v. Wilson* advised Plaintiff Tribe's present Counsel that Plaintiff Tribe's claim outside the Barrett Meander

Line was another law suit, Mr. Flint was fully aware that the Department of Justice was intentionally abandoning Plaintiff Tribe's well documented claim to title to those lands. That Mr. Flint was acting for the benefit of the Defendants who claimed lands within and outside the Barrett Line is unquestionable. Most assuredly Evan L. Hultman's filing of that "constricted complaint" was part of the fraud charged here by Plaintiff Tribe against both Messrs. Flint and Hultman.

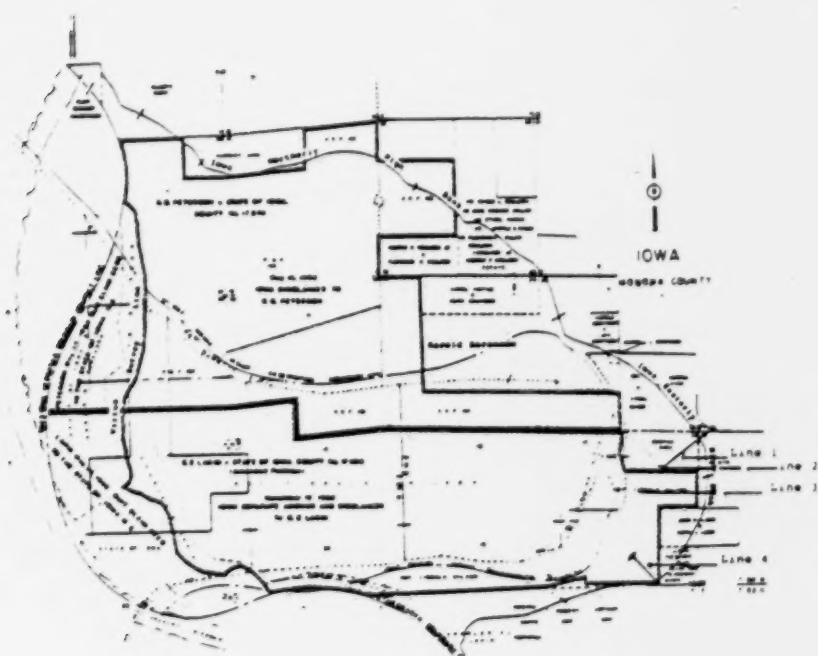


PLATE II

XVI.

As a consequence, for Defendant State of Iowa to assert that the Flint-Hultman fraud does not permeate all aspects of the upcoming trial respecting the lands outside the Barrett Meander Line, is a desperate effort, as stated above, to avoid an expose of the fraud practiced in this Court in *United States v. Wilson*, vastly benefiting Defendant Iowa.

XVII.

**PLAINTIFF TRIBE CONTINUES ITS EFFORTS TO
OVERCOME THE ALL-PERVASIVE FRAUD IN THE
BLACKBIRD BEND LITIGATION**

Plaintiff Tribe, as will be observed from Plate I above, in *Omaha v. Agricultural* claimed title to the full 6390 acres which totally encompassed the Flint-Hultman "constricted complaint" in *United States v. Wilson*. To nullify and overcome the consequences of the fraudulent "constricted complaint," Plaintiff Tribe moved to consolidate the case of *United States v. Wilson* with the case of *Omaha v. Agricultural* only as it pertained to TRACT I, Blackbird Bend. That motion was granted by this Court, expanding, nevertheless, the scope of Plaintiff Tribe's motion to include TRACT II, Monona Bend and TRACT III, Omaha Mission Bend.

XVIII.

Defendants Wilson, Lakin, Iowa, *et al.*, filed their respective Answers and Counterclaims to Plaintiff Tribe's complaint in *Omaha v. Agricultural* and repeated their erroneous affirmative claim to title, as they had claimed in *United States v. Wilson*, that: (1) the Blackbird Bend Meander Lobe had been totally obliterated and washed away; and (2) had been replaced by accretions to the left or Iowa bank of the Missouri River. Issue among Plaintiff Tribe and the named Defendants was thus joined in regard

to the entire 6390 acres within the Blackbird Bend Meander Lobe. It is of controlling importance here, as will be emphasized, that all of the proof by each of the parties pertained to the 6390 acres—not to the lands within the “constricted complaint” in *United States v. Wilson*.

XIX.

This Court, subsequent to its earlier consolidation of all aspects of the case, on April 5, 1976 entered its *sua sponte* Order limiting the litigation to the Flint-Hultman “constricted complaint” in *United States v. Wilson*, mandating, as stated by Mr. Flint, that title to the lands outside the “constricted complaint” would be another law suit.

XX.

By that *sua sponte* Order, this Court markedly adopted the fraud practiced upon Plaintiff Tribe by Messrs. Flint and Hultman and by James Clear, Attorney, Department of Justice who made his appearance in that litigation.

XXI.

Confronted with the disaster of the “constricted complaint,” Plaintiff Tribe took immediate action to counter the *sua sponte* order limiting the proceedings to the 2900 acres as distinguished from Plaintiff Tribe’s claim of 6390 acres. Plaintiff Tribe moved for an order permitting Plaintiff Tribe to present its case in chief antecedent to the offer of evidence by the Department of Justice in *United States v. Wilson*. That motion was granted. Plaintiff Tribe likewise moved to have the Department of Justice aligned as an adversary in the proceedings, obtaining the right to cross-examine the witnesses called by the Department of Justice and to rebut the spurious testimony offered by that Department in the litigation. That motion was likewise granted.

XXII.

The opportunity to cross-examine the witnesses of the Department of Justice was of transcendent value. When the principal witness of the Department of Justice fully supported the claims of the Defendants that the Blackbird Bend Meander Lobe had been totally obliterated, Plaintiff Tribe—in the words of the presiding Judge—succeeded in “rehabilitating” that witness by extensive cross-examination. In the ultimate, that witness was forced to admit that accretions to the Tribe’s Blackbird Bend lands encompassed the entire Blackbird Bend Meander Lobe.

XXIII.

In addition to taking the lead in the trial on the merits, as ordered by this Court, Plaintiff Tribe succeeded in proving—without objection by either the Court or the Defendants—its claim to the full 6390 acres, avoiding totally the attempt by Messrs. Flint and Hultman to limit Plaintiff Tribe’s claim to the 2900 acres within the “constricted complaint.” Plaintiff Tribe by proof of its claim to title to the full 6390 acres was convinced that this Court’s *sua sponte* order—which effectuated the Flint-Hultman fraud—would necessarily be amended to comport with the evidence of all of the parties in contemplation of Rule 15(b)³ of the Federal Rules of Civil Procedure. Despite the

³ *Amendments to Conform to the Evidence*. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure to so amend does not affect the result of the trial of these issues.

explicit language of that Rule that the evidence would be controlling, both this Court and the Court of Appeals violated that Rule, resulting in this retrial.

XXIV.

**PLAINTIFF TRIBE'S RECORD IN OMAHA V.
WILSON⁴ AND WILSON V. OMAHA⁵ ADOPTED HERE, IS
REPLETE WITH PROOF OF THE FLINT-HULTMAN-
CLEAR FRAUD**

Plaintiff Tribe, desirous of avoiding reference to the inceptive and continuing fraud by the named attorneys in the Department of Justice, completed its proof in the constricted trial, successfully prosecuted its appeal to the Court of Appeals for the Eighth Circuit; and obtained an affirmance of the Supreme Court of the opinion of the Court of Appeals. When this Court, ignoring the record in the trial on the merits which pertained to the entire 6390 acres, informed Plaintiff Tribe that the Tribe would be subjected to the "constricted complaint" in *United States v. Wilson*, Plaintiff Tribe had no alternative but to expose the fraud that was practiced upon it through the forced, fraudulent representation by Messrs. Flint, Hultman, and Clear.

XXV.

Though the record is replete with uncontroverted affidavits establishing in explicit detail the fraud practiced upon the Tribe by Flint, Hultman, and Clear, this Court

⁴ 575 F.2d 620 (CA 8, 1978).

⁵ 442 U.S. 653 (1979).

declared that it had not and would not hear the fraud by reason of the fact that the fraud "rabbit" could not be permitted in the Court.⁶ Although that denial of the Tribe's right to be heard on the fraud was made on March 9, 1987, this Court, on April 1, 1987 contradicted the "had not heard and would not hear" declaration, stating, in error, that: "[t]he Tribe had not been denied the right to be heard on their charges of fraudulent representation by the Department of Justice."⁷ That declaration was predicated upon a "whereas clause" in a Tribal Resolution, referring to the fact that Evan L. Hultman had a conflict of interest.

XXVI

On May 1, 1987, Plaintiff Tribe, referring to the fact that this Court's conclusion was predicated upon a most tenuous basis, made this statement to the Court:

Whoever did the research for you was a very patient person. They found a reference to Hultman in a whereas clause of an ancient resolution.⁸

concerning which this Court admitted that: "It was quite hard to find, I agree," adding, moreover, that "... it's by innuendo, rather than by direct reference."⁹ It is in that state of the record that Plaintiff Tribe, suffering irreparable damage due to the fraud, seeks now to be heard on the subject.

XXVII

Irrespective of the fact that Plaintiff Tribe was never heard on the fraud charges, and had never previously

⁶ *Supra.*, p. 2, n. 1.

⁷ April 1, 1987 Order.

⁸ T.R. May 1, 1987, p. 188, ln 20-25.

⁹ *Ibid.*, p. 189, ln. 1-2.

raised the issue of fraud until it became apparent in 1985 that the fraud of Hultman, Flint, and Clear was going to be imposed on Plaintiff Tribe, the Court of Appeals for the Eighth Circuit, relying upon the "whereas clause" in a 1976 Resolution giving rise to an "innuendo" makes this statement:

The Tribe first raised the charges that the Department of Justice attorneys engaged in fraud in 1976.¹⁰

The Court of Appeals then cited an earlier opinion of this Court which declared that Tribe's fraud charges were "... clearly untimely and merit no serious attention or consideration."¹¹ That clear violation of the basic principles must be rejected on the background of the hallmark decision of the Court of Appeal of the Eighth Circuit which declares that where, as here, the same attorneys who practiced the fraud upon the client are before the Court, the issue of timeliness or laches has no application.¹² Continuing in *Fiske v. Buder*, the Court of Appeals for the Eighth Circuit declared that where, as here, an attorney:

... fraudulently connives at his [client's] defeat or sells out his client's interests, the fraud will vitiate any judgment that could be entered.¹³

XXVIII

In its panic to avoid any possible reference to the undeniable fraud practiced upon Plaintiff Tribe, the State of

¹⁰ *Omaha v. Jackson*, 854 F.2d 1089, 1092 (CA 8, 1988).

¹¹ *Ibid.*

¹² *Fiske v. Buder*, 125 F.2d 841, 849 (CA 8, 1942) *cert. den.* 273 U.S. 756 (1942).

¹³ *Ibid.* It is most relevant that the Supreme Court applied the same concepts in *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 249, 250 (1949). See, also, Code of Professional Responsibilities, Canon 9; Vol. 7, *Moore's Federal Practice*, Sec. 60.33, "Fraud Upon the Court," p. 60-359.

Iowa refers to the statement by the Court of Appeals—that had not a scintilla of evidence before it other than the Tribe's uncontroverted affidavits of that fraud—in which it stated that the claims were "frivolous and without merit." Plaintiff Tribe and its Counsel—knowing the contrary is the truth and knowing that the fraud issue has never been heard—can only speculate as to the course of conduct adopted by the Court of Appeals respecting the fraud.

XXIX

This Court had the honesty and integrity to state that it had not and would not hear the fraud. The record would be much improved if the Court of Appeals had pursued that course. The failure of the Court of Appeals to do so cannot change or in any sense alter the indisputable facts reviewed above.

XXX

Overlooked by Defendant Iowa in its anxiety over exposure of the fraud which so vastly benefited Defendant Iowa is the fact that none of the authorities cited in Defendant Iowa's motion in limine have any pertinency here. In that regard reference is made to the declaration by the Court of Appeals in Omaha IV that:

Our judgment in this appeal has no bearing whatsoever on the Tribe's claim to any land outside the boundary of the original reservation which is defined by the Barrett Survey. The judgment [which is the final judgment in this phase of the Blackbird Bend litigation] in the instant case neither prevents the Omaha Indian Tribe from prosecuting nor disposes of the Tribe's pending action to recover accretions to tribal lands against those defendants who now occupy land within the Blackbird Bend area but outside the

boundary of the Barrett Survey area or to damages for trespass to those land.¹⁴

Most assuredly the final decision involving the "constricted complaint" having no bearing "whatsoever" on Plaintiff Tribe's claim outside the Barrett Meander Line does not and could not prevent a trial on the fraud issue.

Wherefore, Plaintiff Omaha Indian Tribe,

RESPECTFULLY PETITIONS THIS COURT to deny Defendant State of Iowa's Motion in Limine and in justice, equity, and good conscience to grant Plaintiff Tribe the opportunity to be heard respecting the fraud practiced upon the Tribe, from which Defendant Iowa has so vastly benefited.

Respectfully submitted,

Dated October 1, 1989. /s/ William H. Veeder

William H. Veeder
818 18th Street, N.W. #920
Washington, D.C. 20006
202-466-3890

Attorney for Plaintiff
Omaha Indian Tribe

¹⁴ *Omaha v. Jackson, et al.*, 864 F.2d 1089, 1096, n.6 (CA 8, 1988).

APPENDIX V

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL INDUSTRIAL
INVESTMENT CO., et al.,

Defendants.

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
4:39 p.m.
OCT 5 1989
WILLIAM J. KANAK - Clerk
By Patsy Smith, Deputy

ORDER

This matter is before the court on plaintiff's resisted
Motions to Reconsider, filed June 9, (#267) and June 12,
1989 (#270) respectively;

* * * *

Motions to reconsider denied. * * * * Motions for sanc-
tions granted. * * * * Defendants' Motions in Limine
granted. * * * *

Motions to Reconsider

The Tribe seeks reconsideration of the court's order of June 2, 1989, denying the Tribe's motion to have the issue of damages severed from the issue of title. Additionally, the Tribe seeks reconsideration of that part of the court's June 2, 1989 order which enjoined the Tribe from farming a 56.6 acre, more or less, parcel of land in lower Monona Bend.

As to the issue of damages, the Magistrate's orders of June 6, 1989, and September 13, 1989, prohibit the Tribe from introducing any evidence on the issue of damages as a sanction for the Tribe's failure to provide any discovery on the issue of damages. In accordance with the Magistrate's order, it is unnecessary for the court to reconsider its earlier order denying the motion to severe damages.

As to the court's order granting an injunction, the Tribe has not come forward with any reason which persuades the court to reconsider its earlier order.

* * * *

Motions for Sanctions

On June 9, 1989, the Magistrate ordered the parties to appear on September 8, 1989, for a final pretrial conference. Additionally, he ordered the parties to meet prior to that conference for the purpose of preparing a final pretrial order.

Defendants assert that they met with Plaintiff on August 22, 1989, for the purpose of preparing the final pretrial order, and that plaintiff was unprepared and failed to participate in good faith. Additionally, defendant Rupp urges that the Tribe made substantial misstatements in its proposed final pretrial order.

Upon review of a transcript of the preliminary pretrial hearing held on August 22 and August 23, 1989, the court

finds that the Tribe was unprepared, combative, and failed to endeavor in good faith to satisfy the purpose of that conference or the final pretrial conference held in Sioux City on September 8, 1989. Perhaps the best characterization of the Tribe's lack of good faith came early in the conference when one of the defendants was inquiring about the Tribe's failure to bring a proposed statement of undisputed facts to the conference. In reply, the Tribe's counsel made the following remark: "I never agreed on anything in 13 years. We'll just go ahead that way" (T.19).¹ The Tribe's lack of preparation and failure to follow the court's standard form for pretrial orders resulted in the Tribe's submission of a wholly unacceptable proposed final pretrial order, and a substantially futile pretrial conference on September 8, 1989. Due to the Tribe's lack of good faith, submission of the final pretrial order has been delayed and another hearing will have to be held. Sanctions against the Tribe are appropriate. Pursuant to FRCP 16(f), the defendants' shall be awarded all reasonable fees and expenses related to their attendance at both the preliminary conference held on August 22 and August 23, 1989, and the hearing held on September 8, 1989.

* * * *

Motions in Limine

Defendants Iowa and Miller, et al. seek an order prohibiting plaintiff from referring to its fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan Hultman, as well as any reference to a "constricted complaint" or any other direct or indirect reference to its fraud claim.

Both this court and the Court of Appeals have found the Tribe's fraud claim to be wholly without merit. *See*

¹ Preliminary Pretrial Hearing Transcript. This transcript submitted to the Magistrate by the parties, shall be retained by the Clerk and marked as "Court's Exhibit 1, Order of October 5, 1989."

Omaha IV, supra, 854 F2d 1089, 1092, n.4 (8th Cir. 1988), *cert. denied* 104 L.Ed2d 986. The Motions in Limine shall be granted.

* * * *

As a final matter, on September 29, 1989, the court entered an order reversing the Magistrate's earlier ruling on expert testimony. This order may result in the need for additional discovery. The parties shall forthwith proceed with any additional depositions deemed necessary.

It is therefore

ORDERED

1. Plaintiff's Motions to Reconsider denied.

* * * *

3. Defendants' Motions for Sanctions granted. By not later than Monday, October 16, 1989, Defendants shall file affidavits setting forth their reasonable fees and expenses incurred in connection with conferences held on August 22 and 23, 1989, and September 8, 1989. By not later than Thursday, October 19, 1989, the Tribe may file a response.

* * * *

7. Defendants' Motions in Limine granted.

* * * *

9. The Clerk shall mark the Preliminary Pretrial Hearing Transcript as "Court's Exhibit 1—Order of October 5, 1989," and retain it with this file.

10. In accordance with the text of this order, plaintiff shall make its experts available for depositions on or before October 13, 1989.

221a

/s/ Edward J. McManus

Edward J. McManus, Judge
UNITED STATES DISTRICT JUDGE

October 5, 1989.

APPENDIX W

DESIGNATION OF DISTRICT JUDGE
FOR SERVICE IN ANOTHER DISTRICT
WITHIN HIS CIRCUIT

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
FEB 12 1990
10:00 am
WILLIAM J. KANAK - Clerk
By Patsy Smith, Deputy

WHEREAS, in my judgment the public interest so requires; Now, therefore, pursuant to the provisions of Title 28, United States Code, Section 292(b), I do hereby designate and assign the Honorable

WARREN K. URBOM

United States District Judge for the District of Nebraska to hold a district court in the Northern District of Iowa during the period beginning February 7, 1990, and ending December 31 1990, and for such additional time in advance thereof to prepare for the trial of cases, or thereafter as may be required to complete unfinished business.

Re: Case No. C 75-4024 U.S. v. John Wilson, et al
Case No. C 75-4026 Omaha Indian Tribe v. Jackson,
et al

Case No. C 75-4067 Omaha Indian Tribe v. Agricultural Industrial Investment,
et al

/s/ Donald P. Lay

Chief Judge
Donald P. Lay

Dated February 7, 1990. Eighth Circuit

Original: Clerk, No. Dist. of Iowa

cc: Judge Urbom

cc: Chief Judge O'Brien

APPENDIX X

IN THE UNITED STATES
DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., *et al.*,

Defendants.

FILED

CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA

DEC 5 1989

WILLIAM J. KANAK Clerk

By _____ Deputy

**PLAINTIFF OMAHA INDIAN TRIBE MOVES THIS
 COURT FOR AN ORDER**
(1) TO SET DOWN A HEARING ALL OF DEFENDANTS'
PENDING MOTIONS TO DISMISS;
(2) TO HEAR AND DETERMINE ON THE MERITS THE
CHARGES THAT PLAINTIFF TRIBE "DELIBERATELY"
MISLED DEFENDANTS;
(3) TO PRECLUDE THE USE OF DEPOSITIONS OF
PLAINTIFF TRIBE'S EXPERT WITNESSES;
AND
(4) PLAINTIFF TRIBE'S RESPONSE TO DEFENDANTS'
CHARGES
WITH
MEMORANDUM IN SUPPORT

Plaintiff Omaha Indian Tribe is confronted with a series of vituperative and unfounded attacks, principally from Defendants Miller, *et al.*, Defendant Agricultural, and Defendants Iowa, *et al.*, requesting dismissal of Plaintiff Tribe's case of *Omaha v. Agricultural* C 75-4067, as it pertains to TRACTS I, II, and III.¹ Though variously stated, those Defendants are charging that Plaintiff Tribe, Plaintiff Tribe's Counsel, and Plaintiff Tribe's expert witnesses have deliberately and intentionally attempted to mislead the Defendants by Plaintiff Tribe's responses to Defendants' interrogatories and that Plaintiff Tribe has likewise intentionally made misstatements in Plaintiff Tribe's Proposed Pre-Trial Order, as it relates to the avulsive movements of the Missouri River in TRACT II, Monona Bend and TRACT III, Omaha Mission Bend.

Due to the variety and viciousness of the attacks made by the Defendants against Plaintiff Tribe—which in the final analysis strikes at the very capacity of this Court to perform its judicial functions until those charges are resolved—Plaintiff Tribe respectfully insists to this Court that Plaintiff Tribe is entitled to a fully, open, and complete

¹ See, Appendix A.

hearing before this Court in which those false charges can be fully exposed and this Court can take appropriate action. Reference is warranted to the nature and character of those charges against Plaintiff Tribe made by the Defendants which include but are not limited to the following:

I.

DEFENDANTS' CHARGES AGAINST PLAINTIFF TRIBE, ITS COUNSEL AND EXPERTS ARE FALSE

A. *False and Libelous Statements of Defendants Miller, et al.*

(1) This libelous statement is taken from the motion filed with this Court on November 15, 1989, by Defendants Miller, *et al.*, seeking sanctions and dismissal of Plaintiff Tribe's case involving TRACTS I, II, and III:

After the September 19 Order, these defendants again move to depose plaintiff's experts, a motion which was vigorously resisted by plaintiff. The reason for such resistance is now apparent. It was (as abundantly shown by the depositions taken over plaintiff's objections) that plaintiff's attorney knew what his experts' testimony would be, knew that he had not disclosed it to defendants, and intended to continue to conceal [sic] the nature of their testimony until he could surprise defendants with it at the trial.

Defendants have been seriously and intentionally prejudiced by plaintiff's repeated violations of Rule 26(b)(4)(A) and defiance of court orders.

Continuing, Defendants Miller, *et al.*, invidiously declare:

If Judge McManus were to withdraw (which we earnestly hope he does not), then any resulting delay should not be used as an excuse for permitting plaintiff to escape the deserved and just consequences of such

flagrant obstructions of the discovery process and contemptuous disobedience of court orders. The appropriate sanction for such misconduct is dismissal of plaintiff's case as to all three TRACTS I, II and III, and these defendants respectfully urge the court to impose such sanctions forthwith.²

Those spurious statements by Defendants Miller, *et al.*, are responded to in subsequent paragraphs of this motion.

B. False and Libelous Statements of Defendant Agricultural

This example from the motion dated October 19, 1989, by Defendant Agricultural—which has been followed by four supplemental motions—underscores the nature of the chicanery practiced in this Court by Counsel for Defendant Agricultural:

16. Plaintiff's refusal to answer interrogatory #4 is another example of plaintiff's systematic, calculated effort to evade and ignore the discovery rules and deliberately mislead Agricultural and prejudice Agricultural's preparation for trial of this case.

17. The conduct of plaintiff, its expert Clark, and plaintiff's counsel have made it impossible for Agricultural to properly and adequately prepare for trial.³

This further statement is taken from the first prayer of that motion:

3. The conduct of plaintiff, its counsel, and plaintiff's experts in deliberately misleading Agricultural as to the theory of plaintiff's case to Monona Bend, justifies the Magistrate's sanction of refusing to permit any expert testimony by plaintiff's witnesses as to Monona

² Defendants November 15, 1989 Motion, p. 8.

³ October 19, 1989 Motion of Defendant Agricultural, p. 5.

Bend, save and except that which was introduced in the first trial.

4. To permit plaintiff's experts to now testify as to a series of avulsions in Monona Bend destroys the very basis of all discovery—namely honest, complete, and truthful disclosure of plaintiff's theory of the case and the facts on which it relies.⁴

Under appropriate headings and with full documentation Plaintiff Tribe will expose the crude sophistry in which Defendant Agricultural is engaging. Unable to defend its squatter's claim to title, Defendant Agricultural seeks at all costs to avoid a trial on the merits.

C. False and Libelous Statements by Defendant Iowa, et al.

It partakes of a national scandal to have Defendant Iowa join with the individual Defendants in practicing fraud upon this Court by their crude misstatements. Both this Court and Plaintiff Tribe are fully aware that Defendant Iowa was a major participant in and the prime beneficiary of the forced fraudulent representation by Evan L. Hultman who, as a United States Attorney, "sold out" Plaintiff Tribe for the benefit of Defendant Iowa, whom he had previously represented as Attorney General for that State. It is even more surprising that Defendant Iowa has engaged in the chicanery of the other Defendants because of its vulnerability due to its full participation in the trial on the merits in the Blackbird Bend litigation in which the witnesses, so invidiously attacked by Defendant Iowa, had testified fully and completely in support of Plaintiff Tribe's assertions that its titles to the lands situated in the State of Iowa were derived from the avulsive movements of the Missouri River. Defendant Iowa's full knowledge of the qualifications of Plaintiff Tribe's witnesses, the

⁴ *Ibid.*, p.6.

credibility of those witnesses, and the theories of Plaintiff Tribe's claim to title so effectively presented by those witnesses underscores the magnitude of the sophistry of Counsel for Defendant Iowa in making these statements:

7. Abrahamson's deposition also revealed that he is not registered as a land surveyor in Iowa and he has never performed a field survey in Iowa. [That statement is contrary to fact.] Moreover the deposition, when transcribed, shows that his ability to research titles in Iowa and Nebraska is deficient of even the basic knowledge as to where title information can be located in both Iowa and Nebraska.

8. On October 27, 1989, at the deposition of Charles P. Corke, it was learned for the first time that Mr. Corke would also attempt to testify as an expert on river hydrology and morphology. [Defendant Iowa, having participated in the trial on the merits, was fully aware of Mr. Corke's qualifications and that Mr. Corke had testified to both river hydrology and morphology.] Plaintiff has never previously disclosed that Mr. Corke would testify regarding river hydrology and morphology or that he would express opinions as to river movements.

9. The "surprises" in these compelled last-minute depositions include four new alleged avulsions in Monona Bend, two new alleged avulsions in Omaha Mission Bend, and the revelation that two witnesses will testify regarding river movements.⁵

The degree of hypocrisy to which Defendant Iowa has engaged—to cover its embarrassment for failing properly to prepare its case—is contained in this sentence.:

10. The extent and significance of these violations, plaintiff's efforts to avoid designation of experts [a

⁵ Defendant Iowa's October 31, 1989 Motion, p.3.

gross misstatement] and to prevent the State from taking these depositions, [grossly untrue] and counsel's continuing representations that he had fully revealed his river morphology claims all show lack of good faith by plaintiff.

Continuing in crude sophistry, Defendant Iowa states:

These acts occurred in the critical last stages of trial preparation [Defendant Iowa did not undertake *any* preparation until after the September 29, 1989 Order] and after this Court had already found a pattern of noncompliance with court orders which would not be cured by lesser sanctions. *See* Orders of March 26, June 2, September 13, September 29, and October 5, 1989. This Court has also previously found the plaintiff Tribe in contempt of court orders, and has been made aware of other contemptuous actions by the Tribe.⁶

Defendant Iowa lashes out in futile anger in its mistaken belief that Plaintiff Tribe, by engaging in the discovery processes, would permit Defendant Iowa to cover up the inceptive fraud practiced in this Court by Defendant Iowa's former Attorney General—a fact which, in the ultimate, will be fully exposed both to the jury in these proceedings and to the citizenry of the State of Iowa in general.

In its continuing effort to escape a trial on the merits, Defendant Iowa attacks Counsel for Plaintiff Tribe in these terms:

11. Plaintiff's counsel clearly intended for the Court and defendants to rely on its representations that the statements of "river morphology" were complete.

12. Defendants suffer serious prejudice as a result of these misrepresentations. The Court also apparently relied on these representations in its September 29,

⁶ *Ibid.*, p. 4.

1989 order concluding that defendants had adequate knowledge of plaintiff's claims and therefore overruling the Magistrate's exclusion of expert testimony.

13. Defendants respectfully renew their requests that the Court dismiss plaintiff's complaint with prejudice. Alternatively, defendants renew their request that sanctions be imposed and that plaintiff be precluded from offering any expert testimony.⁷

II.

GENESIS OF DEFENDANTS' CHARGES OF CONTEMPTUOUS AND IMPROPER CONDUCT

Though variously stated, each of the Defendants to which reference has been made above, has attempted to establish that Plaintiff Tribe has defied this Court's orders and violated its rules. Those charges—without merit—pertained to Plaintiff Tribe's resistance to discovery being improperly conducted while the issues to which that discovery pertained were on review in the Appellate Courts. Plaintiff Tribe had appealed from this Court's May 30, 1987 Final Judgment and Decree, asserting, among other things, that the Decree last mentioned was the product of the forced, fraudulent representation of Plaintiff Tribe in the case of *United States v. Wilson*. Of great concern to Plaintiff Tribe has been the fact that, although the case of *Omaha v. Agricultural, et al.*, in TRACT I pertained to 6390 acres of land in the Blackbird Bend Meander Lobe, which had previously been fully tried by the parties there involved, this Court was demanding that Plaintiff Tribe retry the title to the approximately 3500 acres of land outside the Barrett Meander Line. The discovery process resisted by Plaintiff Tribe involved the title to those lands which was on appeal.

⁷ *Ibid.*, p.5.

III.

Plaintiff Tribe very properly and with appropriate and timely filings repeatedly requested this Court to stay all discovery processes involving the retrial of the title to the Blackbird Bend lands outside of the Barrett Meander Line and the trial on the merits respecting Plaintiff Tribe's claims to title in the Monona and Mission Bend areas until Plaintiff Tribe had exhausted its appellate remedies involving this Court's May 30, 1987 Final Judgment and Decree, which appellate review should not have been interfered with or in anyway impeded.

IV.

This Court, in total disregard of Plaintiff Tribe's right to be heard on appeal from this Court's May 30, 1987 Final Judgment and Decree, at the behest of the Defendants, ordered—while Plaintiff Tribe's appeal was still pending—that Plaintiff Tribe engage in the discovery processes involving not only title to the 3500 acres of land but also demanded that Plaintiff Tribe participate in the discovery processes relating to Plaintiff Tribe's claims to title in TRACT II, Monona Bend, and TRACT III, Omaha Mission Bend. It is undeniable that the May 30, 1987 Final Judgment and decree and the background respecting that decree are inextricably interrelated to the retrial on the merits.

V.

Defendants were fully aware that by forcing discovery upon Plaintiff Tribe antecedent to the exhaustion of the appellate processes that they could—and indeed did—obtain great advantages over Plaintiff Tribe by constantly threatening Plaintiff Tribe with sanctions, including, but not limited to, the dismissal of Plaintiff Tribe's claims. Plaintiff Tribe reiterates its long-time insistence that unless and until the Supreme Court refused to hear Plaintiff Tribe's

charges—which did not occur until May 30, 1989—Plaintiff Tribe should not be coerced into discovery. Irrespective of that fact, this Court entered its Order of May 2, 1989, threatening Plaintiff Tribe with dismissal of its case absent joining in the discovery processes. The Court, moreover, declared that Plaintiff Tribe had until May 15, 1989 in which to answer Defendants' Interrogatories.

VI.

While Plaintiff Tribe's petition for certiorari was still pending, it was forced to respond in detail to Defendants' interrogatories within approximately eight working days. Thus confronted, Plaintiff Tribe's experts—situated in widely separated areas—were forced to assemble data, prepare a final analysis of river morphology, and deliver it to Plaintiff's Counsel for final assembly and service upon Defendants in response to their interrogatories. From May 15, 1989, when Plaintiff Tribe served its responses to the interrogatories upon the Defendants, until expert Clark's deposition on October 11, 1989, Plaintiff Tribe had received no objections or further inquiries in regard to the responses to the interrogatories in question.

VII.

Defendants' False Charges Respecting the Taking of Depositions

Contrary to the misstatements that Counsel for Plaintiff Tribe resisted making its witnesses available for deposition are these indisputable facts:

1. Defendant Iowa on October 4, 1989, demanded that Plaintiff Tribe make available its expert witnesses for deposition "next week." Plaintiff Tribe did not resist the depositions, suggesting—due to the shortness of time and confronted with the order of this Court that Plaintiff Tribe complete the Pre-Trial Order and have it filed on October

16, 1989—that it would be most helpful to delay the depositions one week.

2. On October 5, 1989, Plaintiff Tribe petitioned this Court for an Order "... to grant Plaintiff Tribe the right to make its witnesses available and to depose defendants' named witnesses during the week of October 23-27, 1989, in furtherance of justice to all parties." To date, that motion is still pending.

3. It was not until the October 6, 1989 telephonic conference among the Magistrate, Counsel for Defendant Iowa, and Counsel for Plaintiff Tribe that Plaintiff Tribe was made aware of the fact that this Court had ordered on October 5, 1989, that Plaintiff Tribe, without notice, was required to make its witnesses available on or before October 13, 1989. The October 5, 1989 Order must be considered on this background to comprehend the burden that Order placed on Plaintiff Tribe:

a. Plaintiff Tribe was not informed until Friday noon, on October 6, 1989, that the October 5, 1989 Order had been entered.

b. October 7 and 8 being the weekend, and October 9 being a holiday, Plaintiff Tribe was required to assemble its experts and have them available for deposition at 9:30 a.m. on Tuesday, October 10, 1989, in the Sioux City Federal Courtroom, pursuant to the schedule established by Defendant Iowa.

c. Plaintiff Tribe did not resist—cooperated fully—with the October 5, 1989 Order, irrespective of the fact that Counsel for Plaintiff Tribe was deprived of six full days in which to complete all of the work on the Proposed Pre-Trial Order antecedent to departing for Sioux City, Iowa, on October 9, 1989.

d. It is free from doubt that when Plaintiff Tribe made available its witnesses for deposition on October 10, 1989, Plaintiff Tribe exposed the ploy in which Defendant Iowa

had engaged in seeking to create an impossible burden upon Plaintiff Tribe, its counsel, and its experts by obtaining the October 5, 1989 Order.

VIII.

It is indisputable that Plaintiff Tribe, its Counsel and its experts cooperated totally, fully, and in complete good faith and made available its witnesses in Sioux City, Iowa on October 10, 1989. The record reveals that Plaintiff Tribe, made its witnesss available for deposition by Counsel for Defendants Miller, *et al.*, Defendant Agricultural, Defendants McGuire, *et al.*, and Defendant Rupp. Plaintiff Tribe interposed objections to Defendant Iowa's interrogation predicated upon Plaintiff Tribe's pending October 5, 1989 motion, asserting that it was entitled concurrently to depose Defendant Iowa's witnesses at that time. Once again—by telephonic conference with Counsel for Defendant Iowa, the Magistrate, and Counsel for Plaintiff Tribe—Plaintiff Tribe was ordered to accede to Defendant Iowa's demands, irrespective of Plaintiff Tribe's rightful request concurrently to depose Defendant Iowa's witnesses.

IX.

A. FALSE STATEMENTS BY DEFENDANTS MILLER, ET AL., RESPECTING "SURPRISE"

Counsel for Defendants Miller falsely states that Plaintiff Tribe "vigorously resisted" making its witnesses available for deposition.⁸ That false charge is belied by the fact that Counsel for Defendants Miller, with Tribe's full cooperation, commenced his interrogation of Tribe's witnesses shortly after 9:30 a.m. on October 10, 1989. That false statement respecting "vigorous resistance" was introduc-

⁸ *Supra.*, p. 2-3.

tory to this grossly improper, unprofessional, and despicable lie:

The reason for such resistance is now apparent. It was (abundantly shown by the depositions taken over plaintiff's objections) that plaintiff's attorney knew that he had not disclosed it to defendants *and intended to continue to conceal [sic] the nature of their testimony until he could surprise defendants with it at the trial.* [Emphasis supplied].

That invidious lie—libelous in the extreme—will be more fully exposed in the subsequent portions of this filing.

For Counsel representing Defendants Miller, *et al.*, to charge Counsel for Plaintiff Tribe with planning "... to surprise defendants" with proof of the avulsive movements of the Missouri River over and across TRACT II, Monona Bend partakes of the ridiculous. For 13 years both Counsel for Plaintiff Tribe and Counsel for Defendants Miller, *et al.*, have actively engaged in the discovery processes in which Plaintiff Tribe has conducted extensive drilling throughout the entire Monona Bend Area with the objective of proving the avulsive movements of the Missouri River as they pertain to Plaintiff Tribe's claims to title to lands east of the Missouri River situated in both the states of Nebraska and Iowa. The following chronology establishes the perversion of facts by Counsel for Defendants Miller, *et al.*, in seeking to represent that he was "surprised" by the evidence Plaintiff Tribe intends to offer:

1. November 1, 1976—Trial on the Merits.

Counsel for Defendants Miller, *et al.*, was in attendance at the trial on the merits in the original litigation, although none of his clients was before the Court, and was fully and completely informed both as to the qualifications of Plaintiff Tribe's witnesses and the subject matter of their testimony.

2. Drilling Program Initiated on Monona Bend in 1973.

Dr. Robinson throughout the taking of his deposition repeatedly referred to the fact that his initial geological drilling with the objective of establishing the avulsive movements of the Missouri River was commenced in 1973. Plaintiff Tribe's Exhibit 448, concerning which Counsel for Defendants Miller, *et al.*, had full opportunities to examine, establishes the long and intensive history of Plaintiff Tribe's investigations to establish the avulsive movements of the Missouri River.

3. 1976 Conferences and Exchanges of Information

By a letter dated February 27, 1976, to Plaintiff Tribe's then Counsel, Chief Judge Don O'Brien, entitled "Request for Access to TRACTS II and III, No. C 75-4067," Counsel for Defendants Miller, *et al.*, makes this statement:

This will confirm our conference of February 17 and February 20 with reference to your request for access for Elmer Clark and Charles Robinson to land in TRACTS II and III for purposes of core drilling and visual observation.

In that letter, Counsel for Defendants Miller, *et al.*, acknowledges receipt of the Plat delivered to him locating the line of drill holes and the areas to which access is requested on TRACTS II and III. It is elemental—a fact well known to all parties involved—that the sole purpose for core drilling and surficial investigations of the character conducted by Plaintiff Tribe was to prove avulsive movement of the Missouri River during the pertinent time periods. If Counsel for Defendants Miller, *et al.*, was unaware of the objectives for the drilling, his agreement for access and drilling can only be most generously described as irresponsible. Due to this Court's disastrous *sua sponte* Order of April 5, 1976, ordering the case to be confined to the fraudulent, constricted complaint in *United States v. Wilson*, the investigations in TRACTS II and III were

virtually suspended through the duration of the trial on the merits.

4. 1978 Investigations in TRACTS II and III

When Plaintiff Tribe renewed more intensive investigations on TRACTS II and III, Counsel for Defendants Miller, *et al.*, by a letter dated August 11, 1978, renewed his willingness for Plaintiff Tribe to enter upon the lands of specified clients for the purpose of "hand augering or drilling at the locations indicated on the maps" delivered to Counsel for Defendants Miller, *et al.* Counsel requested that: "If in preparing our defense any of my clients desire . . . to make similar drillings on lands of the Omaha Tribe, the Tribe will grant us similar access." Counsel then added that the conditions contained in the February 27, 1976 letter, referred to above, remain applicable to Plaintiff Tribe.

5. 1981 Plaintiff Tribe's Intensive Drilling Program on TRACTS II and III

By a letter dated March 13, 1981, from Counsel for Defendants Miller, *et al.*, to Counsel for Plaintiff Tribe, reference is again made to the original letter of February 27, 1976, in which Counsel for Defendants Miller, *et al.*, agreed to access for drilling. In that March 13, 1981 letter, Counsel refers, among other things, to Plaintiff Tribe's witnesses who participated in the drilling program:

In this latter [February 27, 1976] I set out the conditions which had to be agreed to before my clients' consent to access to their premises for drilling and observation would be agreed to and you will note Mr. Cline, then Chairman of the Omaha Tribal Council, Mr. Robinson and Mr. Abrahamson (for Mr. Clark) all signed signifying their agreement.⁹

⁹ Letter of March 13, 1981 to William Veeder, Attorney for Plaintiff Tribe from Wiley Mayne, Attorney for Defendants Miller, *et al.*

It is most significant that, as a condition to the access for drilling to establish the avulsive movement of the Missouri River, this provision was imposed on Plaintiff Tribe's experts:

4. My clients will have one or two representatives present during all hand arguring [sic] and drilling and will be permitted at their discretion to take soil samples from holes made by plaintiff's representatives. At present, the only such representative engaged by us is George Hallberg, but we reserve the right to have an additional representative present. The individual farm owners may, of course, also be present.

A copy of that March 13, 1981 letter was submitted to Dr. George Hallberg, a principal witness for Defendants in regard to the morphology of the Missouri River. Dr. Hallberg testified extensively in the original trial on the merits, challenging Plaintiff Tribe's assertions that the Missouri River had moved from the toe of the Easterly High Bank by avulsion. It is most relevant here that Dr. Hallberg admitted that his opinions in regard to the morphology of the Missouri River were predicated upon "educated guesses."

6. *Counsel for Defendants Miller, et al., Participated in the 1981 Drilling Program Which Totally Belies Counsel's Feigned Surprise Respecting Avulsions*

By a letter dated April 6, 1981, Counsel for Defendants Miller, *et al.*, informed Counsel for Plaintiff Tribe of the properties concerning which the Defendants had agreed to permit Plaintiff Tribe's experts to come upon their property and to conduct drilling. The names of those Defendants Miller *et al.*, in TRACTS II and III are set forth below¹⁰ and the location of the properties in question

¹⁰ Edna Sponder, Clara Gordon and Barbara Dahl, Chris Christensen, James and Sue Kent, Harold DuFrene, Don and Joyce Ruth, Ray Gros-

appear graphically on Appendix B of this motion. That Plat, Appendix B, which is Clark's deposition Exhibit No. 1, sets forth the lands claimed by Defendants and graphically displays the areas in TRACTS II and III, Monona and Mission Bends, in which Plaintiff Tribe's experts conducted extensive geological investigations locating the areas where the drilling was actually conducted to establish the location of the abandoned channels of the Missouri River as part of their proof of the avulsive nature of the river movements in the Monona and Mission Bend areas.

It is most significant that the drilling records prepared on site by geologist Michael Kaczmarek, who was acting under the direction of Dr. Robinson, established that the following were present at the drill site: Dr. Robinson;¹¹ Wiley Mayne, Counsel for Defendants Miller, *et al.*; Defendants W. Parker and son and Gordon Dahl; together with Dr. G. Hallberg, Defendants' expert witness. Appendix B also graphically displays the area drilled by Plaintiff Tribe within Defendant Christensen's property locating the 1879 abandoned channel of the Missouri River and the channel from which the Missouri River avulsed after 1879.

It is likewise most relevant that the April 9, 1981 drilling logs on the lands occupied by Defendant Christenson contain this statement by geologist Kaczmarek:

Discussed doing other holes in area with Wiley Mayne [Counsel for Defendants Miller, *et al.*] who encourages us to do so, will proceed to other properties.

It is further stated in those logs that "Mayne and Dahl returned to drilling site." The drilling logs pertaining to

venor Estate, Minnie Marble, Ethel Swan, Lorraine Kutzler, Alice Parker Estate Wallace and Nadine Parker, R. J. Everett, Roy T. Sorensen, and W. L. Stokley. ■

¹¹ Plaintiff Tribe will move to amend Dr. Robinson's deposition to establish that Dr. Robinson, under whose direction Mr. Kaczmarek conducted the drilling program, was, in fact, at the drill site in company with Wiley Mayne and the others listed above.

the lands occupied by Defendant Stockley refer to the fact that: "Mayne was present" during the drilling of that land. When the drilling was conducted on the lands occupied by Defendant Parker, the drilling logs note that Mr. Parker took field notes and accompanied Mr. Kaczmarek during the drilling.

Counsel for Defendants Miller, *et al.*, and Dr. Hallberg, and indeed numerous Defendants were fully apprised of Plaintiff Tribe's claims that the Missouri River moved avulsively after 1879, 1890, and on several separate occasions in addition to those major avulsions. Dr. Hallberg, a purported expert on river morphology, was not only present during the drilling conducted by Plaintiff Tribe but also obtained samples of the areas drilled. Further, the well logs were later delivered to Counsel for Defendants Miller, *et al.*

Finally, and to dispel all possibility that Counsel for Defendants Miller, *et al.* can succeed in feigning surprise that Plaintiff Tribe was asserting avulsive movements of the Missouri River other than the avulsion away from the 1890 channel, these facts are most relevant: Plaintiff Tribe, on July 17, 1989, delivered to Counsel for Defendant Agricultural—who shared the data with Counsel for Defendants Miller, *et al.*, and other Counsel for Defendants—all of Plaintiff Tribe's basic data, including all of the drill logs utilized by Plaintiff Tribe in formulating and proving the avulsive movements of the Missouri River. It is equally relevant that Counsel for defendants Miller, *et al.*, had the well logs in his possession prior to the depositions during which period Counsel for Defendants Miller, *et al.*, returned those well logs to Dr. Robinson.

Moreover, in addition to full knowledge respecting the drilling referred to above in which he participated, Counsel for Defendants Miller had examined all of Plaintiff Tribe's Exhibits as early as August, 1989, having previously received in July 1989, all of the basic data upon which

Plaintiff Tribe predicated its claims respecting the avulsive movements of the Missouri River. Additionally Counsel for Defendant Miller had the full opportunity to review in detail Plaintiff's Exhibit 448,¹² which graphically displays all of the drilling conducted by Plaintiff Tribe in its preparation to establish the avulsive movements of the Missouri River, including drilling, December 1973; drilling, March, 1976; hand augering, March 1976; drilling, November 1978; drilling, April 1981; and drilling, 1986.

**FALSE, DECEITFUL, AND INTENTIONAL
MISSTATEMENTS BY COUNSEL FOR DEFENDANTS
MILLER, ET AL. DEMAND SEPARATE REFUTATION**

1. *No Basis for Dismissal Persual to Rule 16 F.R.C.P.*

Counsel for Defendants Miller, *et al.*, moved this Court "... For Sanctions Of Dismissal" pursuant to Rule 16 F.R.C.P. Having analyzed the Federal Rules of Civil Procedure upon which Counsel for Defendants Miller, *et al.*, relies, it is apparent that the charges are frivolous and most assuredly should be denied. For example, contrary to fact, it is urged that Judge McManus "... has first hand knowledge of the Tribe's and its attorney's repeated and contemptuous failures and refusals to comply with the Court's standing rules and specific orders."¹³ Continuing those charges which are grossly incorrect, Counsel for Defendant Miller, *et al.*, incredibly refers to the delaying tactics used by Plaintiff Tribe and its attorney.

Most assuredly Plaintiff Tribe has not engaged in dilatory practices but—as distinguished from Counsel for Defendants Miller—*et al.*, has completed its preparation and is ready to go to trial. The record is replete with proof that Counsel for Defendants Miller, *et al.*, failed totally to prepare for trial; was stunned by the September

¹² Proposed Pre-Trial Order, p. 129.

¹³ Defendants' Miller, *et al.*, November 15, 1989 Motion, p. 2.

19, 1989 Order, which most assuredly should have been anticipated; and—unable to justify a request for delay in the proceedings—assaults Plaintiff Tribe and its attorney with the objective of avoiding a trial on the merits.

2. September 29, 1989 Order Reversed Magistrate's June 6, 1989 Order.

Under the heading of Supplement to Motion for Sanctions of Dismissal,¹⁴ Counsel for Defendants Miller, *et al.*, refers to the Magistrate's May 2, 1989 Order requiring Plaintiff Tribe to present a statement as "to the opinions that your experts will give" and a summary of the grounds as required by Rule 26(b)(4)(A). Counsel for Defendants Miller, *et al.*, adhering to his consistent practice of dissimulation by half-truths or intentional misstatements, referred to the June 6, 1989 Order of the Magistrate which attempted to limit—incredibly—Plaintiff Tribe's "expert opinions" to the Blackbird Bend Meander Lobe. In seeking a reversal of that Order and the Order of September 13, 1989, affirming the June 6, 1989 Order, Plaintiff Tribe reviewed the misconception upon which the June 6, 1989 Order was entered and further stressed to Judge McManus that the Order as entered was tantamount to an adjudication against Plaintiff Tribe without a trial. On September 29, 1989, the June 6 and September 13, 1989 Orders were reversed—a fact to which Counsel for Defendants Miller, *et al.*, fails to make reference.

3. Plaintiff Tribe Fully Alerted Defendants to Claims of Avulsions

Irrespective of the fact that Counsel for Defendant Miller, *et al.*, had actively participated in Plaintiff Tribe's investigatory and drilling programs to establish avulsive movements throughout Monona Bend, Counsel for Defendants Miller, *et al.*, now attempts to feign surprise

¹⁴ Motion filed November 15, 1989.

that Plaintiff Tribe will undertake to prove several avulsions in that area, and indulges in this sophistry:

*... the Tribe failed to mention and did not alert defendants to any possibility that any of its witnesses would testify to any avulsion other than one avulsion in the Monona Bend between 1890 and 1912.*¹⁵

Counsel for Defendants Miller makes that grossly untrue statement irrespective of fact that he had fully reviewed the drill logs, to which reference is made above, evidencing the fact that counsel Wiley Mayne, Dr. Robinson, Dr. Hallberg, and Defendants Dahl and Parker—probably others—were on the drilling sites set forth on Appendix B, Defendant Christensen's property. Assuming that Counsel for Defendants Miller, *et al.*, did not comprehend the objective of the drilling program—which, of course, is a possibility—Plaintiff Tribe completely rejects out of hand that Dr. Hallberg, Defendants' expert river morphologist, did not comprehend that the drilling along the 1879 channel and the other channels in that area was performed for the purpose of proving that the Missouri River avulsed away from those channels severing accretions to the right or Omaha bank of the Missouri River giving rise to Plaintiff Tribe's claims to title to those lands.

The objection of Counsel for Defendants Miller in the Proposed Pre-Trial Order to Plaintiff Tribe's Exhibit 446 declares:

Objection: Hearsay, hearsay within hearsay; contains opinions and conclusions excluded by ruling of June 6, 1989.¹⁶

Exhibit 446 contains the logs of the drilling in April 1981, in which Counsel for Defendants Miller actively participated. For Counsel to now declare that reference to his

¹⁵ Defendants November 15, 1989 Motion, p. 3. (Emphasis supplied).

¹⁶ Proposed Pre-Trial Order, p. 128, Plaintiff Tribe's Exhibit 446.

presence at the 1981 drilling is "hearsay" is most assuredly in keeping with Counsel's approach to this litigation which is to prevent a trial at all costs.

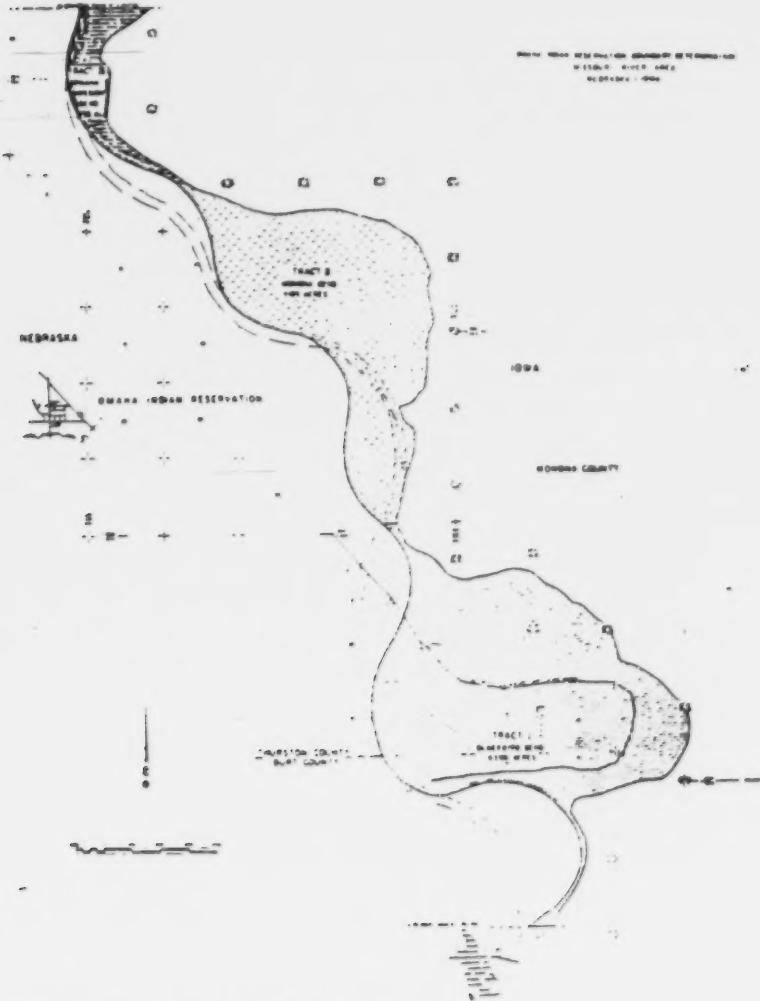
XI.

This Court should reject out of hand the crude attempt by Counsel for Defendants Miller to feign ignorance of the fact that Plaintiff Tribe's claim line, appearing on Appendix A of Plaintiff Tribe's October 6, 1975 Complaint, which is set out on the next page, follows the abandoned channels of the Missouri River and the further fact that those abandoned channels are intact today, proving that the Missouri River avulsed away from those channels. It is reiterated and restated that Counsel for Defendants Miller and Counsel's Expert, Dr. Hallberg, participated in the drilling conducted by Plaintiff Tribe to prove the location of those abandoned channels. Again it is impossible to believe that Defendants Miller's Counsel has the temerity to state that Plaintiff Tribe "... failed to mention and did not alert defendants to any possibility that any of its witnesses would testify to any avulsion other than the one avulsion in Monona Bend between 1890 and 1912." If Counsel for Defendants Miller was not alerted to Plaintiff Tribe's claims that the Missouri River avulsed away from the channels, the drilling on which he participated and his expert did not inform him of the objectives of the drilling, neither Plaintiff Tribe nor its Counsel should be held responsible.

XII.

Counsel for Defendants Miller directed other innumerable charges against Plaintiff Tribe, its Counsel and its experts. Yet in the ultimate, those numerous charges pertain to the meritless assertions that Plaintiff Tribe had in bad faith attempted to mislead Defendants Miller by the unfortunate omissions in the very hurriedly prepared answers to Defendant Agricultural's Interrogatories and Pro-

MAP EXHIBIT A -- OCTOBER 6, 1975 COMPLAINT



OCTOBER 6, 1975 COMPLAINT--EXHIBIT A

EXHIBIT A

posed Pre-Trial Order to which reference is subsequently made.

XIII.

B. FALSE STATEMENTS BY DEFENDANT AGRICULTURAL RESPECTING "SURPRISE"

On October 6, 1975, when Plaintiff Tribe filed its complaint in *Omaha v. Agricultural, et al.*, Plaintiff Tribe pleaded with specificity and graphically displayed by Exhibit A of that Complaint, which appears on the preceding page, the furthest easterly and northerly progression of the Missouri River, with particular reference to TRACT II, Monona Bend. Exhibit A graphically displays the Monona Bend area delineating the northerly and easterly claim line of Plaintiff Tribe's complaint which follows the presently existing abandoned channels of the Missouri River.¹⁷ As will be reviewed and documented in specific detail, Defendant Agricultural's present Counsel knew or most assuredly had the obligation of knowing that those abandoned channels which are physically well defined today, encompassed the land area to which Plaintiff Tribe claims title. Counsel for Defendant Agricultural, moreover, was fully aware that all of the lands presently occupied by Defendant Agricultural were completely obliterated by the northerly and easterly progression of the Missouri River and that the abandoned channels constituting Plaintiff Tribe's claim line define the most easterly and northerly point of progression of that stream. It is likewise known by Counsel for Defendant Agricultural that, for a protracted period of time, the Missouri River did, indeed, occupy the area in which Defendant Agricultural's lands are presently located and that the lands originally patented were obliterated and replaced by accretions. Plaintiff Tribe asserts that those accretions attached to the Omaha or

¹⁷ *Supra.*, Map, following p. 23.

right bank of the Missouri River and, if comprehended, Defendant Agricultural asserts that the lands originally patented, which were destroyed, were replaced by accretions to the left or Iowa bank of that stream—an impossibility.

On that background, there is chronicled Defendant Agricultural's efforts to avoid at all costs a trial on the merits respecting its nonexistent title.

1. Attempts to Avoid a Trial on the Merits by Defendant Agricultural

As early as April 23, 1976, Defendant Agricultural, seeking to avoid a trial on the merits, attempted—without having filed an answer or counterclaim to Plaintiff Tribe's complaint—to resolve the complex factual issues involving the northerly and easterly progression of the Missouri River, which obliterated Defendant Agricultural's lands, by frivolously filing a motion for summary judgment claiming that there were no genuine issues of fact. On June 11, 1979, Plaintiff Tribe served upon Defendant Agricultural comprehensive interrogatories, seeking to have Defendant Agricultural establish the basis upon which it predicated its claim to title to the replacement lands. Those interrogatories were not answered for a period in excess of ten years. It is equally significant that Defendant Agricultural did not answer Plaintiff Tribe's October 6, 1975 complaint until February 10, 1988, and Plaintiff Tribe was not served and did not receive a copy of that February 10, 1988 answer until the preliminary pretrial conference held August 22-23, 1989.

2. As Early as July, 1978, Defendant Agricultural Participated in Plaintiff Tribe's Drilling Program To Establish Avulsions

On July 14, 1978, Plaintiff Tribe's expert Abrahamson submitted to Counsel for Defendant Agricultural, Mr. Shull, a note stating that:

Attached is a copy of the map showing the area where the Omaha Indian Tribe will drill on your clients lands if access is granted by you. ss Willaim H. Veeder by Doyle G. Abrahamson, Land Surveyor.

That note and plat are confirmed by Defendant Agricultural's own filing on June 21, 1989, "Resistance to Emergency Motion. . . ." to which were attached as Exhibit B the same July 14, 1978 note together with the map showing the abandoned channels from which the Missouri River had avulsed. Defendant Agricultural's consent to Plaintiff Tribe's drilling on Agricultural's land is contained in a July 17, 1978 letter in these terms:

This will confirm your request of July 13, 1978, and receipt of the drawing by Charles S. Robinson and Assoc. dated May, 1978 showing the location of the proposed drill holes.

Agricultural & Industrial Investment Company will agree to permit Dr. Robinson, or his properly identified employee, to enter on the property of Agricultural & Industrial Investment Company for the purpose of drilling hand auger holes. . . .

Following that statement, there is set forth the conditions upon which Defendant Agricultural would permit the drilling.

3. *Plaintiff Tribe's 1981 Drilling Program on Defendant Agricultural's Land*

On March 12, 1981, there was submitted to Defendant Agricultural's Counsel, D. Carlton Shull, the following letter:

March 12, 1981

D. Carlton Shull
4th & Jackson
Sioux City, Iowa 51109

Dear Mr. Shull:

Transmitted herewith at the direction of Mr. William H. Veeder is one copy of each of the following data on the Agricultural and Industrial Investment land in T.85N, R.47W., Section 36:

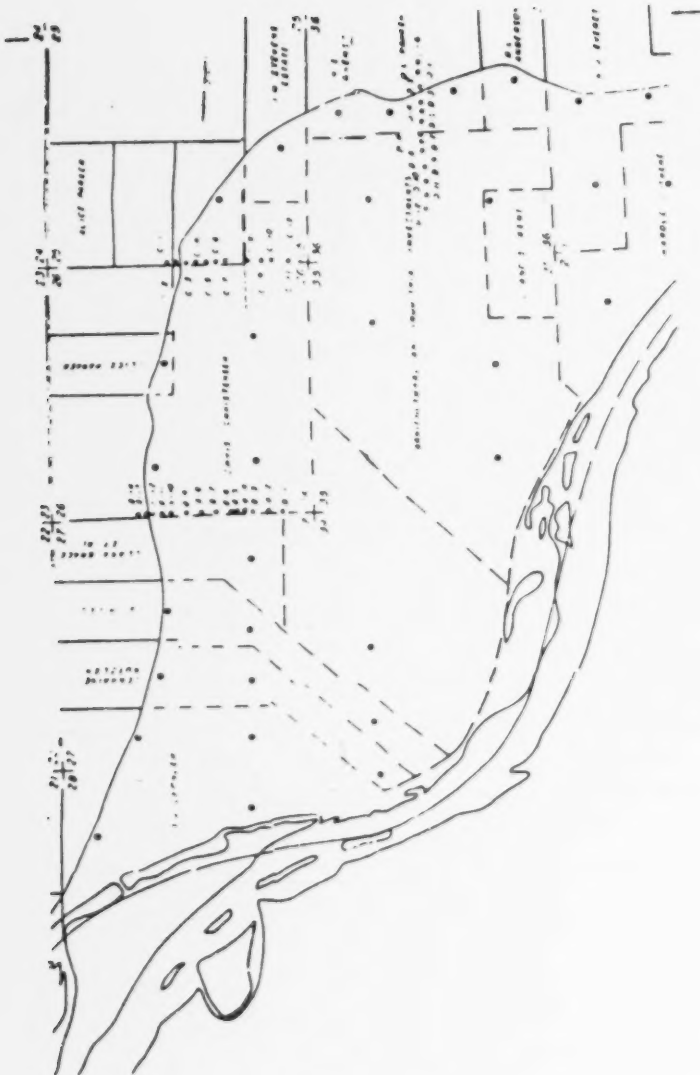
1. Vicinity map showing location of drill holes.
2. 1 copy each of field boring logs for Holes Nos. D-6 through D-12.
3. Test boring logs legend for "D" profile line.
4. Table "D", Details of test boring logs, D-6 through D-12.
5. Figures D-6 through D-12 showing particle size distribution curves for soil samples.

It may be helpful to the Court at this time to consider Appendix B, p. 2, which graphically displays the lands intensively drilled by Plaintiff Tribe with the full cooperation of Defendant Agricultural and other Defendants. There is set forth immediately below the plat locating the areas to be drilled and the abandoned channel from which the Missouri River avulsed after 1879 and prior to 1890.

4. July 1989 Submissions to Agricultural of Proof of Avulsions

There was transmitted to Mr. Madsen, Counsel for Defendant Agricultural, by Plaintiff Tribe's expert river morphologist, Dr. Charles S. Robinson, on July 17, 1989, *all* of the basic data utilized by Plaintiff Tribe's experts in formulating and proving its claim to title to the lands now occupied by Defendant Agricultural. It is relevant that Counsel for Defendant Agricultural acknowledged receipt

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of that basic data on July 19, 1989, listing in Counsel's handwriting, 235 separate items.

It is most significant, in view of the protracted assaults directed at Plaintiff Tribe's Counsel, that Counsel for Defendant Agricultural likewise acknowledged the drill logs, as set forth on the following page, originally submitted to Defendant Agricultural on March 12, 1981 and other drill logs, as reviewed above, and likewise acknowledged receipt of Plaintiff Tribe's Exhibit 448, which sets forth in detail the areas throughout Monona and Mission Bends in which Plaintiff Tribe conducted intensive drilling to establish the avulsive movements of the Missouri River. The basic data supplied to Defendant Agricultural, together with information dating back to 1981, unquestionably put Defendant Agricultural on notice respecting the evidence to which Plaintiff Tribe would rely in establishing all of the avulsive movements of the Missouri River as to TRACTS II and III.

Particular reference is made to Defendant Agricultural's acknowledgment of the basic data upon which Dr. Robinson relied in preparing his geologic cross-sections of the abandoned channels which are positive proof that the Missouri River avulsed away from the Northerly and Easterly High Banks rather than moving away by the process of accretion:

	List of Documents	Description
Plaintiff Tribe's Exhibit No. 466	Rec'd from Charles Robinson	Blue bound spiral notebook app. 1 w/ notation Monona Bend - Grill Holes X- sec A-A ₉ , X-sec B-B ₉ are Holes 1-19 on 1st page inside
	1. Logs of Drill Holes - Monona Bend, Iowa Ka- czmarek, 1981	

Plaintiff Tribe's 19 Map showing of topographical map
 Exhibit No. 448 - Borings 24" x 36"
 Tract II Monona
 Bend Tract III
 Mission Bend

8. Geologic Cross-Sections, Monona Bend Monona County, Iowa B to B₉ C to C₉ D to D₉ 3 graphs approx 33" by 24 on 1 page.
17. Geologic Sections S - N between Sec. 25-26, T 85 N, R 47 W and W- E on Center line Sec. 36, T 85 N, R 47 W 18" on 40" - 2 cross sections as labeled.
18. North South Section Along County cross-section Road between . . . Sec. 26, T 85 N, 14" x 24"

Additionally, at the depositions held October 23-27, 1989, Dr. Robinson made available to Counsel—for Agricultural the exhibits—all of which are listed in the Proposed Pre-Trial Order—graphically displaying the cross-sections of the Missouri River which Dr. Robinson utilized to establish the avulsive movements of that stream. Moreover, it is most relevant that those principal exhibits used in the deposition, which are listed below, were transmitted by Dr. Robinson to Counsel for Defendants Agricultural on November 1, 1989:

449. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1852.
450. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1867.
451. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1867.
452. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1890.
453. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1912.

454. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1923.
455. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1927.
456. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1928.
457. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1930.
458. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1930.
459. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1945.
460. Geologic Cross-Sections, Monona and Omaha Mission Bends, 1974.
461. Logs of Drill Holes in 1879 + Missouri River Abandoned Channel Northern High Bank, Monona Bend.
462. Logs of Drill Holes in 1879 and 1890 Missouri River Abandoned Channels, Eastern and Southern High Banks, Monona Bend.
463. Logs of Drill Holes in 1923 and 1927 - 1928 Missouri River Abandoned Channels, Northern High Bank, Monona Bend.

Reference is likewise warranted to the fact that, in addition to the comprehensive data and exhibits submitted by Dr. Robinson to Counsel for Defendant Agricultural 174 of the 235 items were data from Tribe's expert Elmer M. Clark. There is set forth below examples of the data submitted by Mr. Clark, establishing beyond controversy that Plaintiff Tribe in total good faith attempted to assist by complete disclosure of its basic data:

Received from Elmer Clark 7/19/89

100 Aerial photographs (3 sheets)

- 101 Undated and unlabeled aerial photo
- 102 Undated and unlabeled aerial photo
- 103 US Corps of Engineers map 1923 mile 746.7 to 754.5
- 104 Plaintiff, Omaha Tribe's Exhibit 1930 Aerial Photo Mosaic
- 105 Photo index Missouri River Study Area
- 106 12 Sheets unlabeled aerial photos—handwritten 1927

In determining whether this Court should dismiss Plaintiff Tribe's complaint, as prayed for by Defendant Agricultural and the other Defendants, it should consider the degree of total cooperation in exchanging information in which Plaintiff Tribe has engaged in furtherance of the discovery processes. The Court should likewise take into consideration that continuously through four brutal days of depositions Counsel for Defendant Agricultural—seeking his moment in the sun—was fully instructed and completely informed by Mr. Clark respecting the minutia of Plaintiff Tribe's preparation. During those four days Mr. Clark, utilizing Plaintiff Tribe's Exhibits and on the background of the basic data submitted to Counsel for Defendant Agricultural on July 17, 1989 explained every phase and aspect of the movements of the Missouri River in Monona Bend.

This Court should likewise consider the sham and sophistry in which Counsel for Defendant Agriculture has engaged in falsely representing to this Court that Plaintiff Tribe has undertaken to avoid full disclosure of its basic facts, theories and indeed, the order of proof respecting the morphology of the Missouri River in Monona Bend and should reject out of hand as grossly frivolous the following quoted excerpt from Defendant Agricultural's request for dismissal:

- 16. Plaintiff's refusal to answer interrogatory #4 is another example of plaintiff's systematic, calculated effort to evade and ignore the discovery rules and

deliberately mislead Agricultural and prejudice Agricultural's preparation for trial of this case.

17. The conduct of plaintiff, its expert Clark, and plaintiff's counsel have made it impossible for Agricultural to properly and adequately prepare for trial.¹⁸

If Counsel for defendant Agricultural, predicated upon the information supplied to him by Plaintiff Tribe, could not properly and adequately prepare Defendant Agricultural's case, the problem is not Plaintiff Tribe's failure to inform him but rather the basic inability of Defendant Agricultural to establish title to the lands that it has occupied without right, title, or valid claim of interest.

5. False Statements by counsel For Agricultural Are Exposed By His Own Conduct

Counsel for Defendant Agricultural falsely charges that Plaintiff Tribe, its Counsel and its experts had "... deliberately" misled Defendant Agricultural as to the theory of Plaintiff's case and predicated upon that spurious accusation, Counsel for Defendant Agricultural—as would be expected—fully supports the Magistrate's sanctions against Plaintiff Tribe which would preclude the offer of expert testimony respecting Plaintiff Tribe's claims to title to lands in the Monona and Mission Bend areas.¹⁹ Counsel for Defendant Agricultural then lectures this Court by declaring that if Plaintiff Tribe is permitted to offer evidence respecting "a series of avulsions in Monona Bend" that permission would have the affect of destroying the "... basic of all discovery—namely honest, complete, and truthful disclosure of plaintiff's theory of the case and the facts on which it relies."²⁰ Counsel for Defendant Agricultural, as early as 1978 and at all times thereafter was fully aware

¹⁸ 3. October 9, 1989 Motion of Defendant Agricultural., p. 5.

¹⁹ *Ibid.*, p. 6.

²⁰ *Ibid.*

that Plaintiff Tribe was asserting that the Missouri River moved avulsively away from the abandoned channels which constitute the exterior boundaries of the lands to which Plaintiff Tribe claims title in Monona Bend.

Plaintiff Tribe requests this Court to consider the grossly frivolous motions and supplements to those motions filed by Defendant Agricultural to consider the fact that Plaintiff Tribe went far beyond reasonable discovery in the controversy with Defendant Agricultural and all other Defendants in Monona and Mission Bends; and should reject the motions to dismiss and likewise dismiss all other requests for relief submitted by Defendant Agricultural.

In Plaintiff Tribe's review of Defendant Iowa's false contentions—likewise seeking dismissal or other relief against plaintiff Tribe—it should be remembered that Counsel for Agricultural, Counsel for Defendants Miller, and Counsel for Defendant Iowa acted in closest concert stemming from their desperation in having failed to undertake any preparation for trial until after September 29, 1989.

XIV.

C. FALSE AND LIBELOUS STATEMENTS BY DEFENDANTS IOWA, ET AL.

1. *To Defendant Iowa's Propensity for Land Grabbing, There Must Be Added the Charge of Duplicitous Conduct*

Though this Court in its *in limine* order has suppressed the fact that Defendant Iowa readily accepted title to approximately 800 acres of land in the Blackbird Bend Meander Lobe, title to which was obtained by the fraud of its former Attorney General, Evan L. Hultman, Defendant Iowa is, nevertheless, stigmatized by its own conduct in these proceedings. For that reason, Plaintiff Tribe is not shocked by Defendant Iowa's false charges. Defendant Iowa has the temerity to make this hypocritical statement:

On October 27, 1989 at the deposition of Charles P. Corke, it was learned for the first time that Mr. Corke would attempt to testify as an expert on river hydrology and morphology. Plaintiff has never previously disclosed that Mr. Corke would testify regarding river hydrology and morphology or that he would express opinions as to river movements.²¹

That quoted statement by Defendant Iowa is typical of the dissimulation which Defendant Iowa has engaged in throughout every phase of this litigation. It actively participated in the original trial on the merits in which Mr. Corke testified that he was an Agricultural Engineer, graduated from the University of Nebraska; and that from 1948 forward Mr. Corke was employed as a "hydrologist" with the Bureau of Indian Affairs and the Bureau of Reclamation. In answer to the inquiry as to his duties and responsibilities throughout that protracted period of time, Mr. Corke stated:

A. During that entire period of time with various aspects of hydrology, water supply, flood control, sedimentation, studies and analyses of project planning.

* * * *

Q. Would you state in regard to experience on river movements and boundary locations, would you state what your experiences were along that line?

A. My initial experience was when I was assigned to assist in the preparation of Indian claims in the water adjudication of *Arizona versus California*. . .

Q. What were your functions in regard to river movements and locations particularly along the main stream of the Colorado River?

²¹ Defendant Iowa's October 31, 1989 Motion, p. 3.; See Supra., p. 5.

- A. During the preparation of the evidence there were boundary disputes along the Colorado River. . . . The most serious ones and the most numerous ones were along the sizeable Colorado River Indian Reservation, which is bisected by the Colorado River nearly its entire length. And in that instance the State of California had entered the Union in 1850, and the boundary of California was the center of the Colorado River, between California and the then territory of Arizona.²²

Mr. Corke declared that the issues respecting the movements of the Colorado River and the movements of the Missouri River were precisely the same, adding that the preparation of the litigation in both cases "... entailed all the intensity studies that were made, geology, river morphology, historical. . . ." establishing that his qualifications as an expert in the several fields concerning which he is fully qualified to testify. Respecting Mr. Corke's qualifications, this statement is most relevant:

<p>Mr. Peters: [Counsel for Defendants R.G.P. Inc., Wilson, Rupp, et al.]</p>	<p>That's objected to [any further qualifying testimony]. . . . I think the witness has adequately explained his qualifications. We acknowledge him to be a qualified witness.²³</p>
---	---

Defendant Iowa's assertions that Plaintiff Tribe had failed to assert the areas in which Mr. Corke is to testify is clearly erroneous. In the summary of Mr. Corke's testimony, it is stated, among other things:

"Mr. Corke directed, reviewed, and approved the acceptability of the investigations upon which the Tribe's

²² T.R. Vol. One, November 1, 1976, p. 67-68; T.R. Vol. Two, November 15, 1976 p. 1431.

²³ *Ibid.*

claims are predicated. . . . As director of all technical investigations which have been conducted since 1973, Mr. Corke will testify as to the results of those investigations which very substantially and conclusively verify the claims of the Omaha Indian Tribe that the properties in question are part of the Treaty lands of the Omaha Indian Tribe. In connection with those technical investigations, Mr. Corke will testify as to the close supervision he at all times exercised over the professional surveyor, the geohydrologist-geologist and surveyor-researcher with the objective of fulfilling the responsibilities of the United States of America, Trustee owing to the Omaha Indian Tribe in these cases."²⁴

Mr. Corke is unquestionably qualified to testify in the areas concerning which Defendant Iowa has bitterly but without foundation objected, and Plaintiff Tribe will utilize Mr. Corke as an expert in the several fields in which he was qualified in the original trial.

Counsel for Defendant Iowa, revealing a lack of comprehension of the testimony in which Defendant Iowa participated in the original trial on the merits, attacks the qualifications of Plaintiff Tribe's expert Doyle Abrahamson, grossly misstating the fact that Mr. Abrahamson "... has never performed a field survey in Iowa." Contrary to that statement, this quotation from the record in the original trial on the merits is taken:

Q. And what did you do in the field of surveying in the location of properties in connection with these lands Blackbird Bend, Mr. Abrahamson?

A. We did surveys in the Area of Blackbird Bend to locate ourselves so we could prepare our exhibits.²⁵

²⁴ Proposed Pre-Trial Order, TRACTS II and III, p. 188; TRACT I, p. 150 *et seq.*

²⁵ T.R. Vol. Eleven, November 15, 1976, p. 1415.

Additionally, in qualifying Mr. Abrahamson in the forthcoming trial on the merits in regard to Monona and Mission Bends, Mr. Abrahamson will testify respecting the field surveys which he conducted antecedent to establishing the serious errors in the location of the Nebraska-Iowa Compact Boundary.

Counsel for Defendant Iowa further attacks Mr. Abrahamson as being "... deficient of even the basic knowledge as to where title information can be located in both Iowa and Nebraska." That invidious attempt to demean Mr. Abrahamson partakes of a childish tantrum scarcely requiring response. Yet once again the fact remains that Mr. Abrahamson testified comprehensively in the original trial in regard to all aspects of title issues respecting both Nebraska and Iowa's official records. Quite obviously Mr. Abrahamson was capable of not only locating the proper offices but likewise capable of very effective testimony in the trial on the merits based upon those records, concerning which Defendant Iowa did not object.

The lack of knowledge as to the expertise of land surveyors in testifying respecting river movements, as displayed by Counsel for Defendant Iowa, evidences a deficiency in Counsel's background rather than that of Mr. Abrahamson. It is worthy of note that, in the original trial on the merits in which Mr. Abrahamson testified extensively in regard to river movements, Defendant Iowa failed to interpose any objections to Mr. Abrahamson's qualifications or his testimony.²⁶ It is understandable why Defendant Iowa is most resentful of Mr. Abrahamson's ability to testify respecting river morphology. It was Mr. Abrahamson who conclusively demonstrated that all of the 800 acres of land to which Defendant Iowa was awarded title, based on the Hultman fraud, had been completely washed away long prior to the occupancy by the Defendant

²⁶ T.R. Vol. Three, November 3, 1976, p. 348, *et seq.*; Vol. Eleven, November 15, 1976, p. 14, 15.

squatters, including Defendant Iowa, and had been replaced by accretions to Plaintiff Tribe's Reservation lands in Section 13 and 24, T. 24 N., R. 10 E., 6th P.M.²⁷ Defendant Iowa's attacks on Plaintiff Tribe's witnesses must be viewed as petulant frustration for having failed properly to prepare for the Monona and Mission Bends trial. For Plaintiff Tribe to be forced to respond to attacks on the qualifications of its witnesses—all of whom were qualified as experts in the fields to which their evidence was offered—is simply reflective of the measure of the malice against plaintiff Tribe for having the temerity to challenge the land-grabbing propensities of Defendant Iowa. That course of conduct will not thwart Plaintiff Tribe.

2. Defendant Iowa's False Charges of "Compelled Depositions"

Plaintiff Tribe wishes to dispel Defendant Iowa's assertions respecting "compelled depositions." That assertion by Defendant Iowa is strikingly similar to Defendants Miller's false charges of "vigorously resisted" depositions.²⁸ Defendant Iowa seeks to represent that Plaintiff Tribe has not fully cooperated in regard to the discovery processes. There has been reviewed above, in explicit detail, the expeditious manner in which Plaintiff Tribe made available its witnesses for deposition, virtually without notice and likewise made available to Defendant Iowa for examination all of Plaintiff Tribe's exhibits at the Preliminary Pre-Trial Conference on August 22-23, 1989; at the depositions October 10-13, 1989; and again at the depositions on October 23-27, 1989. The "last-minute depositions"—requested by Defendant Iowa and complied with by Plaintiff Tribe—were part of the ploy in which Defendant Iowa engaged in seek-

²⁷ T.R. Vol. Eleven, November 15, 1976, p. 1417, *et seq*; See in particular Mr. Peter's cross-examination of Mr. Abrahamson, p. 1422.

²⁸ *Supra.*, p. 2, *et seq.*, and p.12., *et seq.*

ing to create an impossible schedule for Plaintiff Tribe which ploy failed totally.²⁹ Plaintiff Tribe very properly demanded that Defendant Iowa make its witnesses available concurrently with Plaintiff Tribe's witnesses, all as mandated by Rule 26(d) of the Federal Rules of Civil Procedure. Reference in that connection is made to Plaintiff Tribe's October 5, 1989 motion—which is still pending—requesting the Court to require Defendant Iowa to also make its witnesses available for deposition. When Plaintiff Tribe challenged Defendant Iowa to make its witnesses available, Counsel for Defendant Iowa remonstrated that it was necessary for Defendant's witnesses to have an opportunity to prepare for depositions. An examination of the record will reveal that Counsel for Defendant sought to cloak his lack of preparation for depositions by bluff and bluster.

Defendant Iowa's numerous filings since the last deposition seek falsely to represent that Plaintiff Tribe has failed properly to cooperate in the discovery process.³⁰ There it is incorrectly stated that Plaintiff Tribe sought "... to avoid designation of experts. . . ." That is a patent falsehood. On May 15, 1989 Plaintiff Tribe served upon Defendant Iowa a full list of Plaintiff Tribe's witnesses, together with a full summary of their testimony. It is stated, moreover, that Plaintiff Tribe's conduct shows a "lack of good faith." That is simply incorrect. Plaintiff Tribe, again as revealed and documented above, on July 17, 1989, supplied to Defendants all of its basic data, including all of the information concerning river morphology and the predicate upon which Plaintiff Tribe is claiming avulsive movements of the Missouri River.³¹ When that basic data submitted to Defendants is considered on the background of presentation of all of its Exhibits and the

²⁹ *Supra.*, p. 11, para a, b, c, and d.

³⁰ Defendant Iowa's October 29, 1989 Motion, p. 1.

³¹ *Supra.*, p. 28, *et seq.*

deposition of its witnesses for nine full days at which time Defendant Iowa had the opportunity for a third time to examine those exhibits, Defendant Iowa's charges of "lack of good faith" on the part of Plaintiff Tribe must necessarily fail.

3. Defendant Iowa's Feigned "Surprises" at Plaintiff Tribe's Proof of Avulsions

Plaintiff Tribe is not feigning—it is experiencing shock to have Defendant Iowa, in apparent seriousness, declare that out of the "compelled" last-minute depositions Plaintiff Tribe was claiming "four new alleged avulsions in Monona Bend and two new alleged avulsions in Omaha Mission Bend."³²

Counsel for Plaintiff Tribe has interrogated in depth Plaintiff Tribe's witnesses in an effort to find the sources for the six avulsions to which Defendant Iowa refers. It has been very properly suggested that if Counsel for Defendant Iowa has determined or its witnesses have decided that there are six avulsions, Plaintiff Tribe would necessarily find that information most helpful.

A. Defendant Iowa Fully Represented at Plaintiff Tribe's Drilling

Defendant Iowa has designated Gerald Jauron "as an expert witness" who participated in the original trial on the merits.³³ During the comprehensive drilling by Plaintiff Tribe on Monona and Mission Bends to establish the avulsive movements of the Missouri River in those two areas, Mr. Jauron was present and witnessed the drilling conducted under Dr. Robinson's direction.³⁴ That drilling conducted in the presence of Gerald Jauron, who was at the

³² *Supra.*, p. 5-6.

³³ Proposed Pre-Trial Order, p. 193.

³⁴ Plaintiff Tribe's Exhibit 446, Logs of Drill Holes, Monona Bend, Tract 2, 1981.

time an official in Iowa's Department of Natural Resources, is most significant in exposing Defendant Iowa's sham in regard to "surprises." It is likewise important that Mr. Jauron was in daily attendance at the original trial on the merits and as one of Defendant Iowa's experts was fully aware of the qualifications and expertise of Plaintiff Tribe's witnesses.

Dissipating any possibility of Defendant Iowa's successfully posturing in regard to "surprises" is the fact that Dr. Hallberg, who likewise testified in the original trial on the merits has been designated by Defendant Iowa as a principal expert witness.³⁵ Dr. Hallberg was likewise present with Gerald Jauron at the drilling on Defendant Ruth's property. Dr. Hallberg was likewise present at the drilling sites together with Counsel Wiley Mayne and other Defendants on the Christensen property and elsewhere.³⁶

It is most significant that Defendant Iowa's experts Mr. Jauron and Dr. Hallberg were present when Plaintiff Tribe intensively drilled the abandoned channel of the 1890 River³⁷ from which the Missouri River avulsed, all as asserted by Plaintiff Tribe in the answers to interrogatories and in the Proposed Pre-Trial Order. During the course of that drilling, Plaintiff Tribe likewise entered upon the property of Harold and Doris Dufrene and drilled hole 14.³⁸

B. Plaintiff Tribe Provided In-Depth Information to Defendant Iowa Respecting Plaintiff Tribe's Claimed Avulsions

At the October 24, 1989 deposition and thereafter, Dr. Robinson explained in detail and graphically displayed the

³⁵ Proposed Pre-Trial Order, p. 193.

³⁶ Plaintiff Tribe's Exhibit 446, Logs of Drill Holes, Monona Bend, Tract 2, 1981.

³⁷ See, Appendix B, p. 2, Drill Holes B-1 through B-5 in Section 11, T. 84 N., R. 47 W. of the 6th P.M.

³⁸ Appendix B, p. 2, Drill Hole 14 in Section 2, T. 84 N., R. 47 W. of the 6th P.M.

drilling areas and the cross-sections of the channels which Dr. Robinson prepared to demonstrate the avulsive character of the river movements. Reference is also made to the fact that Counsel for Defendant Iowa received from Dr. Robinson all the exhibits involving the cross-sections submitted to Counsel for Defendant Agricultural, thus conclusively demonstrating the areas in which Dr. Robinson is prepared to testify as to the avulsions that took place in the relevant time periods.

**THERE IS NO MERIT TO MOTION OF DEFENDANTS
McGUIRE AND BARTON TO DISMISS PLAINTIFF
TRIBE'S CLAIM OR TO PROHIBIT PLAINTIFF TRIBE
FROM OFFERING EVIDENCE**

Defendant James McGuire and Myron Barton, previously executors of the Estate of Maude B. Hudgel, had moved to dismiss Plaintiff Tribe's claim in this proceedings pursuant to Rule 37(b) and 41(b) of the Federal Rules of Civil Procedure, or alternatively to prohibit Plaintiff Tribe from offering expert evidence in support of its claim. Markedly Defendants McGuire and Barton have echoed the approaches taken by Defendants Miller, Agricultural, and Iowa. For the reasons expressed above, the McGuire and Barton motion lacks merit.

"Surprise" Is also Feigned by Defendants McGuire and Barton

Defendants McGuire and Barton refer to "'new' revelations" and assert that Plaintiff Tribe has made inaccurate and misleading representations respecting river morphology and add this surprising revelation of their own:

The last minute revelations show that Plaintiff Tribe has attempted to prevent the Defendants from properly discovering Tribe's case.

There is no need to repeat the facts recited above that:

(1) Plaintiff Tribe, on July 19, 1989, submitted all of its basic data to Defendant Agricultural, who, it is understood, shared that data with the other Defendants;

(2) Plaintiff Tribe at the August 22-23 Preliminary Pre-Trial Conference presented for examination to the Defendants who had prepared their own exhibits and had them available for examination. It is believed that Defendants McGuire and Barton did not have any exhibits available in regard to river morphology;

(3) Plaintiff Tribe served upon Defendants McGuire and Barton a copy of Plaintiff Tribe's initial Proposed Pre-Trial Order setting forth the facts and law upon which Plaintiff Tribe would rely in the trial on the merits, listing fully its exhibits which it intended to utilize which were formulated on the basis of the complete data referred to in (1) above.

(4) Defendants McGuire and Barton were present at the nine days of depositions and had an opportunity in depth to interrogate Plaintiff Tribe's witnesses;

(5) Had available to them all of Plaintiff Tribe's exhibits to examine and to use in interrogating Plaintiff Tribe's witnesses. It is impossible to perceive how discovery could have been more completely conducted or with greater revelation. Plaintiff Tribe made available to Defendants McGuire and Barton all of Plaintiff Tribe's exhibits at the depositions conducted on October 10-13 and October 23-27, 1989, which exhibits were available for the interrogation of Tribe's witnesses; and

(6) Finally, it will be observed from Appendix B, p. 2, that the land comprising the Maude Hudgel Estate [McGuire and Barton] is wholly encompassed by the intensive drilling of Plaintiff Tribe's experts across the entire eastern boundary of the Hudgel Estate including the abandoned channel from which the Missouri River avulsed. That abandoned channel intersects the northern boundary

of the Hudgel property. It is equally clear that Plaintiff Tribe likewise intensively drilled along the western boundary of Defendant Parker's and Defendants McGuire's and Barton's property. The results of that drilling clearly establish that the Missouri River avulsed away from the abandoned channels and that the lands claimed by Defendants McGuire and Barton, having been completely washed away and obliterated, had been replaced by accretions to the Omaha or right bank of the Missouri River.

**DEFENDANT DONALD L. RUPP JOINS DEFENDANT
WILSON, ET AL., FOR AN ORDER OF DISMISSAL
PURSUANT TO RULE 16(f)**

Plaintiff Omaha Indian Tribe has extensively reviewed the background and history of these proceedings and the fact that the parties had granted access to Plaintiff Tribe to conduct extensive drilling upon their properties as part of Plaintiff Tribe's preparation of proof that the Missouri River moved avulsively from the several stream beds that it occupied throughout the relevant time periods in this litigation. It is most important to note that as early as 1978 Plaintiff Tribe had intensively drilled the lands claimed by Defendant Rupp, all as fully disclosed on Appendix B, page 2. The results of that drilling have been provided to Defendant Rupp by Plaintiff Tribe. Most assuredly there is no predicate for Defendant Rupp at this date to assert that plaintiff Tribe had "surprised" Defendant Rupp by its claim that the Missouri River had proceeded easterly to the 1928-1929 channel and that thereafter the Missouri River, as a braided stream, had moved away from the 1928-1929 channel and had occupied the 1930 channel. In Plaintiff Tribe's Proposed Pre-Trial Order this statement is taken:

7. Period 1923 - 1929

From 1923-1929 the Missouri River was a braided stream which flowed within the Omaha Indian Re-

servation in the Monona and Mission Bend areas. The characteristics and movements are clearly shown on U.S. Corps of Engineers maps for 1927 and 1928.

8. Period 1929 - 1956

From 1929 to the early 1930 the Missouri River was a braided stream that frequently changed channels all within the Omaha Indian Reservation as shown on the U. S. Corp of Engineers maps for 1930 and 1932. . . .³⁹

Due to the unique characteristics of the Missouri River and the history of that stream in its progression to the Easterly High Bank in the 1928-1929 period, Plaintiff Tribe, as will be observed above, had noted that the Missouri River, particularly in the reach of that stream in the vicinity of Defendant Rupp's property, had frequently changed its main channel.

Deposition October 25, 1989 of Dr. Charles Robinson

In the course of the interrogation of Dr. Robinson the issue of the river movements in that area was the subject of intensive interrogation by Counsel for Defendant Rupp. In that interrogation, Dr. Robinson declared that the Missouri River avulsed away from the Easterly High Bank between the years 1928 and 1930.⁴⁰ There is thus added to the avulsions to which counsel made reference at the October 24, 1989 depositions⁴¹ the 1928-1930 avulsion of the Missouri River away from the Easterly High Bank.⁴²

³⁹ Proposed Pre-Trial Order, p. 197-198.

⁴⁰ Deposition, T. R. October 25, 1989, p. 494, ln. 3.

⁴¹ *Infra.*, p. 49, *et seq.*

⁴² Counsel for Plaintiff Tribe brings to this Court's attention that Dr. Robinson stated in his October 25, 1989 deposition that there had been an avulsion of the Missouri River between 1912 and 1923 in the *lower Monona Bend*. That statement is clearly erroneous, and will be corrected by Dr. Robinson.

Plaintiff Tribe declares that—on the basis of its full and complete disclosure of all of its preparation for trial, the opportunity of Defendants, including Defendant Rupp, to analyze in depth Plaintiff Tribe's exhibits, together with an opportunity of nine days of depositions in which Counsel for Defendant Rupp interrogated those witnesses respecting all of Plaintiff Tribe's exhibits—there is no basis for dismissal of Plaintiff Tribe's case as prayed for by Defendant Rupp.

Plaintiff Tribe in requesting a full hearing in open Court respecting the issues that have been presented include in that hearing the clearly erroneous *in limine* order concerning which Plaintiff Tribe, on October 2, 1989 filed with this Court its opposition to Defendant Iowa's motion *in limine*. Plaintiff's October 2, 1989 Motion was obviously ignored by this Court for, in that October 5, 1989 Order, it is declared, contrary to fact, that Defendants' motion *in limine* was "unresisted." Understandably, Defendants Wilson, *et al.*, and Defendant Iowa, *et al.*, the prime beneficiaries of the Hultman fraud and having been unjustly enriched by that fraud, viciously attack Plaintiff Tribe and its Counsel for insisting that the fraud issue, which strikes at the very power of this Court to function, must be heard

**DEFENDANTS CANNOT IN HONESTY CLAIM THEY
WERE SURPRISED, MISLEAD, OR PREJUDICED BY
PLAINTIFF TRIBE**

**A. *The Ongoing Continuance
of the Trial Date***

On this date, December 4, 1989, the Defendants in this case in TRACTS I, II, and III have had notice for a period in excess of 30 days that:

The trial of this case, currently set forth November 6, 1989 is continued until further order of court.

In the October 30, 1989 Order vacating the trial date reference is made to this Court's October 20, 1989 Order

explaining in these terms the reason for the Court's granting the continuance in the trial date:

As a final matter, the court [Judge McManus presiding] must advise the parties that this judge is ready and willing to proceed with the trial of this case if the parties are willing to consent to have the matter tried in Cedar Rapids. However, this judge will not be able to try this matter in Sioux City due to the projected length of the trial. If the parties do not consent to have the matter tried in Cedar Rapids, the trial of the case will have to await the availability of another judge.

For whatever reason the case was continued, the fact remains that Defendants have been afforded an opportunity fully to prepare for trial, utilizing the data supplied to them by Plaintiff Tribe.

B. Defendants Deprived of Any Basis for Their Spurious Charges of Surprise, Prejudice or Having Been Misled

Gone without a trace are the alleged consequences of the false charges that plaintiff Tribe had failed to inform Defendants that the Missouri river avulsed away from the Northerly and Easterly High Banks after 1879. Accordingly, the Defendants now have a full opportunity to prepare to meet Plaintiff Tribe's proposed amendments to the Pre-Trial Order. Respecting the "Period 1879-1890" this single sentence was read by Plaintiff Tribe into the record at the October 23, 1989 Pre-Trial Conference.

After 1879, the Missouri River continued to erode easterly and northerly and then avulsed away from the Northerly and Easterly High Banks leaving an abandoned channel at the toe of those banks.

As recommended on October 23, 1989, that statement was added as the opening sentence of the paragraph in the

Proposed Pre-Trial Order to which reference is made below.⁴³

Plaintiff Omaha Indian Tribe has conclusively established that, when its good-faith efforts are cast upon the sea of malice permeating all aspects of Defendants' conducts, it simply invites additional intrigue, slander, and vicious attacks. On the day following the simple addition to the Proposed Pre-Trial Order respecting the avulsion of the Missouri River after 1879 from the Northerly and Easterly High Banks in Monona Bend, Plaintiff Tribe, in grave error, attempted again to assist the Defendants. Plaintiff Tribe was fully aware that, in the Omaha Mission Bend area, all as stated in the Proposed Pre-Trial Order, during the period of years after 1923, the Missouri River was a braided stream and that there were frequent changes in the location of the main channel of the Missouri River. Plaintiff Tribe was likewise aware that the braided condition of the Missouri River in that area prevailed throughout the 1923-1929 period and through the 1929-1956 period.⁴⁴ Predicated upon discussions with Plaintiff Tribe's experts, Counsel for Plaintiff Tribe suggested prior to taking the depositions on October 24, 1989, the following statements:

To the last paragraph, the period 1912-1923, I would add this statement: The Missouri River avulsed away from the easterly high bank in the northern segment of the Omaha Mission Bend, leaving a well defined abandoned channel. Now that is the amendment to the 1912-1923.⁴⁵ ,

⁴³ Proposed Pre-Trial Orde, TRACT ii, Monona Bend, TRACT III, Omaha Mission Bend, IV. A. Factual Issues, 1. Plaintiff Tribe's Factual Issues, para. 4. Period 1879-1890," p. 196.

⁴⁴ *Ibid.*, p. 197, 198.

⁴⁵ T. R. October 24, 1989, Testimony of Dr. Charles Robinson p. 1, 2. Those revisions are made in Plaintiff Tribe's Proposed Pre-Trial

Then for the period 1929-1956, after the first sentence in that period I would add this amendment. Our investigations have revealed that the Missouri River avulsed away from the toe of the easterly high bank leaving a well defined abandoned channel in the lower segment of the Omaha Mission Bend.⁴⁷

Reference is made above to the 1928-1930 avulsion away from the Easterly High Bank, concerning which Dr. Robinson testified on October 25, 1989. This amendment to the Pre-Trial Order is proposed regarding that avulsion:

The Missouri River between the years 1928 and 1930 avulsed away from the Easterly High Bank in lower Monona Bend.

As a consequence there have been two additions to the 1929-1956 Period and Plaintiff Tribe proposes that the Pre-Trial Order be amended to read as follows:

B. Period 1929 - 1956

From 1929 to the early 1930s the Missouri River was a braided stream that frequently changed channels all within the Omaha Indian Reservation as shown on the U.S. Corp of Engineers maps for 1930 and 1932. *The Missouri River between the years 1928 and 1930 avulsed away from the Easterly High Bank in lower Monona Bend. Moreover, the Missouri River avulsed away from the toe of the easterly high bank leaving a well defined abandoned channel in the lower segment of the Omaha Mission Bend.* Starting in the mid-1930s the Corp of Engineers initiated a program to control the flow of the Missouri River. Between 1945 and 1956 much of the Missouri River in the

Order at "IV. A. FACTUAL ISSUES, 1. Plaintiff's Factual Issues," paragraph "6. Period 1912-1923," p. 197.

⁴⁷ *Ibid.*, paragraph "8. 1929-1956," p. 198.

Monona and Mission Bend portion of the Omaha Indian Reservation had been controlled.⁴⁷

Plaintiff Tribe will file with this Court and serve on all parties a motion requesting that the October 16, 1989, Proposed Pre-Trial Order be amended to incorporate the revisions set forth above.

Plaintiff Tribe has, of course, read the rancor of the Defendants in their numerous attacks upon the limited revisions in the Proposed Pre-Trial Order, charging Plaintiff Tribe with infamous conduct and its Counsel with gross immorality. Plaintiff Tribe and its Counsel assert again that there was no intent to deceive or mislead either the Court or the Defendants. Plaintiff Tribe and its Counsel, at the hearing which is requested, has the right to refute the false and libelous statements referred to in the opening pages of this motion. The fact remains that from 1981 forward Counsel for the Defendants, most assuredly their experts, and probably the Defendants themselves, were fully aware of Plaintiff Tribe's claim that the river moved avulsively all as referred to in the proposed limited revisions in Pre-Trial Order, which are simply reflective of the drilling program conducted by plaintiff Tribe in its preparation for trial.

The ongoing continuance of the trial date affords Defendants ample time to prepare their claims and defenses on the background of the amendments which have been set out above concerning which all parties have been previously fully apprised. There has been reviewed and documented in explicit detail the facts establishing beyond controversy that the Defendants and their experts were placed fully on notice, at least as early as 1981, of Plaintiff Tribe's basic claim of the avulsive movements of the Mis-

⁴⁷ "IV. A. FACTUAL ISSUES, 1. Plaintiff's Factual Issues," paragraph "8. Period 1929-1956," p. 198. Proposed Amendments emphasized.

souri River and—assuming *arguendo* only—that Defendants were not fully aware of Plaintiff Tribe's claimed avulsions, the ongoing continuance of the trial date has afforded Defendants a full opportunity to prepare for trial.

WHEREFORE, Plaintiff Omaha Indian Tribe,
RESPECTFULLY PRAYS THIS COURT:

1. To deny all of the Defendants' motions to dismiss and all of the motions seeking sanctions against plaintiff Tribe's offering evidence in the Monona and Mission Bend areas as prayed for by Defendants, or alternatively,

2. To set down for a hearing in open court Defendants' charges against Plaintiff Tribe and permit Plaintiff Tribe to offer evidence to prove that Plaintiff Tribe, as falsely charged, has not deliberately misled the Defendants;

3. To suppress and deny Defendants the right to utilize the depositions of Plaintiff Tribe's experts absent affording Plaintiff Tribe an opportunity fully to depose Defendants' expert witnesses and the right to examine all of Defendants' exhibits in preparation for the trial on the merits; and

4. For all other relief as would be proper under the circumstances.

Respectfully submitted,

Dated: December 4, 1989 /s/ William H. Veeder

818 18th Street, N.W. #920
Washington, D.C. 20006
202 466-3890

Attorney for
Omaha Indian Tribe

APPENDIX A

There have been filed in this Court and served upon Plaintiff Omaha Indian Tribe motions to dismiss Plaintiff Tribe's case *Omaha v. Agricultural, et al.*, C 75-4067, purportedly pursuant to Rule 16(f), Rule 37(b) (2) (c), and Rule 41(b) of the Federal Rules of Civil Procedure. Those motions and the Supplements to them are as follows:

Defendants Edna Boulden Miller, et al:

1. Resistance to Plaintiff's Proposed Pre-Trial Order and Motion for Sanction of Dismissal Pursuant to Rule 16(f) F.R.C.P., filed October 20, 1989.
2. Edna Boulden Miller et als' Supplement to Resistance to Transfer and Petition for Recusal and Supplement to Motion for Sanction of Dismissal, filed November 15, 1989.

Defendants Agricultural & Industrial Investment Company:

1. I. Motion to Dismiss II, Alternate Supplemental and Renewal of Agricultural's October 6, 1989 Motion for Reconsideration of Court's September 29, 1989 Order, with Brief of Agricultural & Industrial Investment Company in Support of Motion to Dismiss and Supplemental and Renewal Motion for Reconsideration, dated 19 October 1989.
2. Resistance of Agricultural & Industrial Investment Co. to Plaintiff's Motion To File Pre-Trial Order' and Objections to Pre-Trial Order, dated 20 October 1989.
3. Extracts of Deposition of Elmer Clark in Support of Agricultural & Industrial Investment Company's Resistance to Plaintiff's 'Motion to File Pre-Trial Order'; Agricultural's Objections to Pre-Trial Order, and Agricultural's Supplemental and Renewal Motion for Reconsideration of Court's Order Authorizing Plaintiff's Expert Testimony, dated 24 October 1989.

4. Supplemental to I. Resistance of Agricultural's & Industrial Investment Co. to Plaintiff's 'Motion To File Pre-Trial Order' and Objections to Pre-Trial Order I. Agricultural's Motion for Reconsideration of Court's September 29, 1989 Order, filed 25 October 1989.
5. Second Supplement to I. Resistance of Agricultural's & Industrial Investment Co. to Plaintiff's 'Motion to File Pre-Trial Order' and Objections to Pre-Trial Order II. Agricultural's Motion for Reconsideration of Court's September 29, 1989 Order, dated 27 October 1989.
6. Third Supplement to I. Resistance of Agricultural & Industrial Investment Co. to Plaintiff's 'Motion to File Pre-Trial Order' and Objections to Pre-Trial Order II. Agricultural's Motion for Reconsideration of Court's September 29, 1989 Order, dated 31 October 1989.
7. Fourth Supplement to I. Resistance of Agricultural & Industrial Investment Co. to Plaintiff's 'Motion to File Pre-Trial Order' and Objections to Pre-Trial Order II. Agricultural's Motion for Reconsideration of Court's September 29, 1989 Order, dated 3 November 1989.

Defendants Iowa, et al.

1. Defendants State of Iowa and Iowa Department of Natural Resources' Motion To Dismiss with Prejudice Pursuant to Rules 41(b) and 16(f), F.R.C.P., with Memorandum in Support, dated 29 September 1989.
2. Defendants State of Iowa and Iowa Department of Natural Resources' Motion To Dismiss and Alternative Motion To Preclude Plaintiff from Offering Any Expert Testimony RE: Monona Bend and Omaha Mission Bend, dated 18 October 1989.

3. Defendants State of Iowa and Iowa Department of Natural Resources' Objections to Tribe's Proposed Pre-Trial Order, dated 18 October 1989.
4. Defendants State of Iowa and Iowa Department of Natural Resources' Supplement to State's Objections Proposed Pretrial Order, Hand-delivered on 24 October 1989.
5. Supplement To State's Motion To Dismiss; Motion for Sanctions, dated 26 October 1989.
6. Defendants State of Iowa and Iowa Department of Natural Resources' Second Supplement to Motion To Dismiss and Alternative Motion To Preclude Plaintiff from Offering Any Expert Testimony Re: Monona Bend and Omaha Mission Bend; Supplement to Objection to Tribe's Proposed Pretrial Order; and Supplement to Motion to Reconsider, dated 31 October 1989.
7. Defendants State of Iowa and Iowa Department of Natural Resources' Resistance to Plaintiff Tribe's Motion for Order to Regulate Further Discovery, etc., dated 7 November 1989.

Defendants James McGuire and Myron Barton:

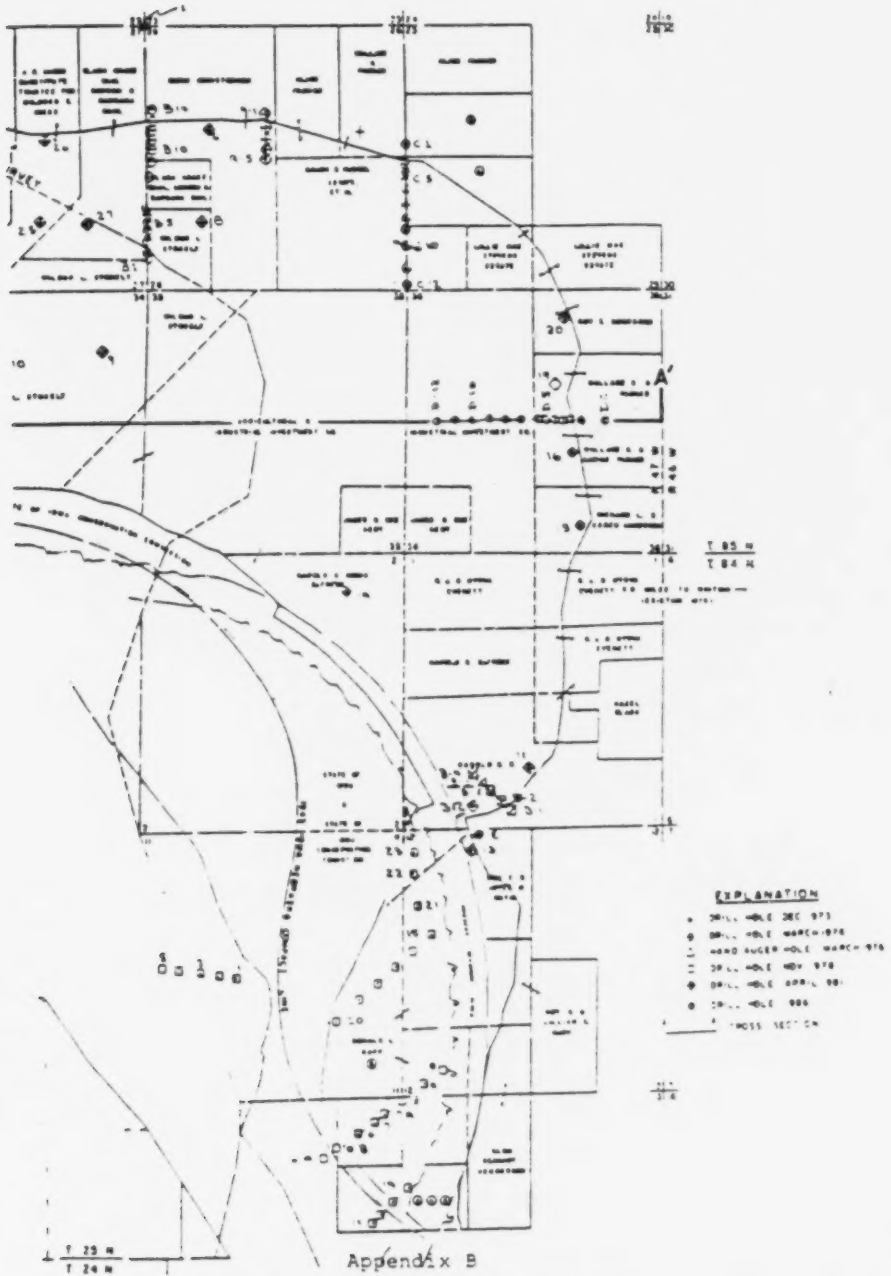
1. Motion To Dismiss or, Alternatively, To Prohibit Plaintiff from Offering Expert Testimony Regarding TRACT II, Monona Bend, and TRACT III, Omaha Mission Bend, dated 20 October 1989.
2. Joinder in State of Iowa and Iowa Department of Natural Resources' Objection to Plaintiff's Proposed Pre-Trial Order, dated 20 October 1989.

Defendant Donald Rupp

1. Objection of Wilson, Jackson, Lakin, R.G.P., Inc., Peterson and Rupp to Motion To File Pre-Trial Order and Motion for Sanctions of Dismissal Pursuant to Rule 16(f) FRCP, daated October 17, 1989.



Appendix B
Land Ownership and Drill Hole Map
Monona and Mission Bends



0258

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT CO., *et al.*,

Defendants.

FILED
CEDAR RAPIDS HDQTRS OFFICE
NORTHERN DISTRICT OF IOWA
JAN 16 1990

8:59 am

WILLIAM J. KANAK - Clerk
By Patsy Smith, Deputy

ORDER

This matter comes before the court pursuant to the following motions pending before the United States Magistrate: plaintiff's October 5, 1989 motion for an order respecting depositions; plaintiff's October 16, 1989 motion to file the final pre-trial order; plaintiff's November 1, 1989 motion for additional time to respond to the pending dispositive motions (as supplemented on November 13, 1989). The court rules as follows:

The latest proposed final pre-trial order submitted by the plaintiff does not comply with previous orders directing its preparation. Further, at the supplemental final pre-trial conference, the plaintiff abandoned many of the objections previously asserted to the defendants' exhibits. The proposed final pre-trial order does not comply with court orders and does not reflect the status of this litigation. This motion is denied.

On October 5, 1989 and again on November 1, 1989, the plaintiff has moved to depose defendants' expert witnesses. All of these witnesses were well known to the plaintiff long before discovery concluded. The only thing taking place since the completion of discovery that plaintiff relies upon in these motions is the order of the Honorable Edward J. McManus overruling this court's order striking plaintiff's expert witnesses. However, the defendants' expert witness designations were not the subject of either this court's order nor Judge McManus' order. Plaintiff has failed to demonstrate why these depositions could not have been and should not have been taken while discovery was open. Good cause has not been shown for an extension of the discovery deadlines to accomplish what should have taken place while discovery was still open.

Upon the foregoing,

IT IS ORDERED

1. Plaintiff's October 16, 1989 motion to file the final pre-trial order is denied.

2. Plaintiff's motions to depose the defendants' expert witnesses are denied.

3. Plaintiff's motion for an extension to respond to defendants' dispositive motions is granted. Plaintiff's January 8, 1990 response to the dispositive motions is deemed timely filed.

4. Attorney P.L. Nymann's December 19, 1989 motion for withdrawal of appearance on behalf of Iowa Public Service Co. is granted.

January 15, 1990.

/s/ John A. Jarvey

John A. Jarvey, Chief Magistrate
UNITED STATES DISTRICT COURT

APPENDIX Y

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

FILED

Cedar Rapids Hdqtrs Office
Northern District of Iowa
Mar 13 1990
By: William J. Kanak-Clerk

PLAINTIFF OMAHA INDIAN TRIBE'S MOTION TO
HAVE HONORABLE WARREN K. URBOM HEAR AND
DETERMINE ISSUES PRESENTED HERE AND
RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS
WITH PREJUDICE

* * *

denied to Plaintiff Tribe in the fraudulent, constricted complaint, in clear violation of common honesty and the Code of Professional Responsibilities.

C. That *sua sponte* Order effectively forces Plaintiff Tribe to retry title to the 3590 acres of land in

the Blackbird Bend Meander Lobe which title was fully tried by Plaintiff Tribe in the original trial on the merits among Plaintiff Tribe and Defendants Iowa, Lakin, Wilson and R.G.P. Inc.¹

Judge McManus' second violation of Plaintiff Tribe's judicial due process stems from the "gag" order of October 5, 1989. That order prohibits Plaintiff Tribe, its Counsel, and all others, representing Plaintiff Tribe from referring in the retrial of the 3590 acres to (1) the Flint- Hultman fraud; (2) the fraudulent "constricted complaint" in *United States v. Wilson*; and (3) the "sell out" by Evan L. Hultman who, as Attorney General for Defendant Iowa, had obtained title to lands for Defendant Iowa concerning which Flint and Hultman denied Plaintiff Tribe's title.²

Judge McManus' third violation of Plaintiff Tribe's rights to judicial due process stems from Judge McManus' ongoing efforts unjustly to disburse Plaintiff Tribe's \$950,000, derived from Plaintiff Tribe's farming operations, held in this Court's Registry Fund. Judge McManus would take Tribe's funds and allocate those funds among Defendants Wilson and R.G.P. Inc., for "alleged back rentals," plus interest, which claims for back rental are directly attributable to the Flint-Hultman fraudulent "constricted complaint" denying Plaintiff Tribe's title to lands concerning which Plaintiff Tribe proved its title in this Court.³ Judge McManus would, moreover, pay the balance of the Registry Fund to the Department of Justice.⁴

Judge McManus' fourth violation of Plaintiff Tribe's right to judicial due process stems from the acceptance by Judge McManus of the fraudulent agreement by Attorneys in the Department of Justice who stipulated to pay Defendants

¹ See, *Infra*, p. 8, *et seq.*

² *Infra*, p. 16, *et seq.*

³ *Infra*, p. 17-18; p. 21-22.

⁴ *Infra*, p. 17-18; p. 22-28.

Wilson and R.G.P. Inc., \$1,900,000, plus interest, totaling approximately \$5,000,000 for alleged expenditures for improvements to Plaintiff Tribe's lands which improvements were principally made by the United States Corps of Engineers.⁵

Judge McManus' violations of Plaintiff Tribe's rights to judicial due process are markedly attributable to Judge McManus' abdication to Magistrate Hodges⁶ of the Constitutional powers invested in the judges by Article III of the Constitution. When Counsel for Plaintiff Tribe personally challenged as egregious the *ex parte* communications between Magistrate Hodges and Counsel for Defendants Lakin, Wilson, and others, Magistrate Hodges response was that the charges were frivolous. Yet the content and impact of Judge McManus' *sua sponte* order—framed precisely to force upon Plaintiff Tribe the fraudulent constricted complaint and the fraudulent representation by Evan L. Hultman—can be understood only as undue influence being exerted upon Judge McManus and Magistrate Jarvey.

Judge McManus has likewise markedly abdicated the oſpowers of this Court to Magistrate Jarvey. From the June 6, 1989 order entered by Magistrate Jarvey denying, in total error, Plaintiff Tribe's right to offer expert evidence in support of its claims to title respecting TRACTS II, Monona Bend and TRACT III Mission Bend, Plaintiff has experienced Magistrate Jarvey's partiality for the Defendants to these proceedings, in clear violation in 28 U.S.C. 455(a).⁷

Finally, Plaintiff Tribe has responded to the erroneous charges directed against Plaintiff Tribe by Defendants, particularly those charges made by Defendant Iowa, which

⁵ *Infra.*, p. 28, 29 *et seq.*

⁶ *Infra.*, p. 28-33.

⁷ *Infra.*, p. 33.

is a principal participant in and beneficiary of the Flint-Hultman fraud.

On that background, Plaintiff Omaha Indian Tribe respectfully presents to Judge Urbom its motion and response to Defendants' motions to dismiss Plaintiff Tribe's claims with prejudice.

* * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE,

Plaintiff,

vs.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

PLAINTIFF OMAHA INDIAN TRIBE'S MOTION TO
HAVE HONORABLE WARREN K. URBOM HEAR AND
DETERMINE ISSUES PRESENTED HERE AND
RESPONSE TO DEFENDANTS' MOTIONS TO DISMISS
WITH PREJUDICE

Plaintiff Omaha Indian Tribe, in petitioning this Court to deny the motions for entry of judgment of dismissal with prejudice of Defendants Iowa, Lakin, Wilson, *et al.*, R.G.P., Inc., *et al.*, Agricultural, Sorenson, Miller, *et al.*, McGuire and Barton, refers to the Order dated February 7, 1990, of the United States Court of Appeals for the Eighth Circuit, filed in this Court on February 12, 1990, designating the Honorable Warren K. Urbom:

... to hold a district court in the Northern District of Iowa during the period commencing February 7, 1990, and ending December 31, 1990, and for such additional time in advance thereof to prepare for the trial of the cases, or thereafter as may be required to complete unfinished business. Re: Case No. C 75-4-67. *Omaha Indian Tribe v. Agricultural Industrial Investment, et al.*

Plaintiff Tribe likewise refers to the fact that the Honorable Edward J. McManus entered an order of recusal on January 12, 1990, in which Judge McManus declared, among other things, that:

While some motions remain pending, they are best left to the judge to whom this case will be assigned. . . .

leaving for determination by the Honorable Warren K. Urbom long-pending "dispositive motions," dating from October 5, 1989, including but not limited to Plaintiff Tribe's December 5, 1989 comprehensive motion alleging the salient and controlling facts in this litigation and respecting a full and complete hearing in regard to the "dispositive motions" and for other relief, and respectfully prays Judge Urbom to hear and determine those long-standing motions antecedent to disposing of Defendants' motions for dismissal filed in this case by the above-named Defendants, to which response is likewise made in the subsequent portion of this motion. Except where otherwise stated, Plaintiff Tribe's reference to Defendant Iowa refers to all movants.

I. CRITICAL ISSUES OF JUDICIAL DUE PROCESS DOMINATE ALL ASPECTS OF THIS LITIGATION

Plaintiff Omaha Indian Tribe presents to the Honorable Warren K. Urbom the historic fact that Plaintiff Tribe has at all times claimed title to the land which is the subject *res* in these proceedings. Confronted with the failure of the Trustee United States to fulfill its obligations to Plaintiff Tribe over a protracted period of time, Plaintiff Tribe instituted on its own behalf, relying upon Counsel of its own choice, its action in *Omaha v. Agricultural, et al.*, No. C 75-4067, to quiet title to 6390 acres in TRACT I, Blackbird Bend Meander Lobe; 4185 acres in TRACT

II, Monona Bend; and 725 acres in TRACT III, Omaha Mission Bend.

II.

The lands in TRACTS I, II, and III are all located in the State of Iowa, the vast preponderance of which are east of the Nebraska-Iowa Compact Line, as graphically displayed on the following page. The Supreme Court in its hallmark decision, *Wilson v. Omaha*, sustained Plaintiff Tribe's basic contentions in this litigation that acts of Congress, which had never been invoked by the Attorney General of the United States, were controlling in this litigation:

Because of recurring trespass upon and illegal occupancy of Indian territory, [by non-Indian squatters, as here] a major purpose of these Acts as they developed was to protect the rights of Indians in their properties. Among other things, non-Indians were prohibited from settling on tribal properties, and the use of force was authorized to remove persons who violated these restrictions.¹

III.

It was the flagrant disregard by the whiteman of the vested titles of Indian Tribes that 200 years ago in 1792 gave rise to the several Congressional enactments designed to preserve and protect Plaintiff Omaha Indian Tribe and other Tribes. Pursuant to those acts, Plaintiff Omaha Indian Tribe, acting with agents of the Trustee United States of America went peaceful into possession of lands within the Blackbird Bend Meander Lobe which has always been part of Plaintiff Tribe's ancient tribal homeland. That occupancy was totally legal, sustained by the Supreme Court,

¹ *Wilson v. Omaha*, 442 U.S. 653, 660 (1979).

and completely within Federal law pursuant to which Plaintiff Tribe acted.

* * *

LXXIII.

In the final paragraph, Defendant Iowa makes this incredibly inaccurate and desperate statement:

Certainly the defendants have been prejudiced by the misconduct and delay of the plaintiff, which brought this action 15 years ago and has never provided an accurate statement of its claims to the land⁷³

Once again that statement can only be described as bizarre, false, and utilized by Defendant Iowa improperly to mislead Judge Urbom. Plaintiff Tribe, in its complaint in C 75-4067, claims title to the lands in question predicated upon its Treaty of 1854, pursuant to which the Omaha Indian Reservation was created and concerning which Plaintiff Tribe asserts that the 11,300 acres are part of that Reservation. Reference is also made to Appendix A of Plaintiff Tribe's complaint which graphically displays the location of the lands in question. In Appendix B those lands are described in metes and bounds which cannot be more accurately set forth. It is most relevant to Judge Urbom that this is the first attack ever made by Defendant Iowa or anyone else that Plaintiff Tribe "has never provided an accurate statement of its claims to the land." Judge Urbom is requested to reject that contention.

SUMMARIZATION

Plaintiff Tribe refrained from recasting a pre-trial order while Judge McManus was presiding. In that connection Plaintiff Tribe's motion for recusal has been pending in

⁷³ Memorandum in Support, p. 9, final paragraph.

this Court since October 24, 1989. On January 12, 1990, Judge McManus recused himself and on February 12, 1990 Judge Urbom was designated to proceed with the trial of this case. Most assuredly the ultimate pre-trial order must conform to and carry out Judge Urbom's directions.

A prime reason for Plaintiff Tribe's request that Judge McManus recuse himself is the "gag" order obtained by Defendant Iowa precluding any reference in the retrial of the title to the 3590 acres to the fraud and to the constricted complaint giving rise to the need for the retrial.

Directly and immediately involved in the content of the pre-trial order are the issues pending before this court in Plaintiff Tribe's December 5, 1989 motion and responses to the "dispositive motions," the ultimate resolution of which must be determined antecedent to any pre-trial order setting forth the "status of the litigation." All of those issues have been fully reviewed and discussed above.

WHEREFORE, Plaintiff Omaha Indian Tribe,

RESPECTFULLY PRAYS THIS COURT:

1. To deny all of the pending motions to dismiss with prejudice and all of the motions, particularly those pertaining to sanctions, until Judge Urbom has had a full opportunity to become acquainted with the issues and has held a hearing permitting Plaintiff Tribe's to make its presentation in regard to those issues.

2. To hear and determine Plaintiff Tribe's February 14, 1990 renewed motion that Judge McManus recuse himself from presiding over the distribution of the \$950,000 in the Registry Fund, and that Judge Urbom should be authorized to hear and determine the respective rights of the parties and to permit Plaintiff Tribe to participate in any hearing respecting the distribution of those funds, all as prayed for in the February 14, 1990 motion.

3. To hear and consider all pending motions, including, but not limited to the December 5, 1989 motion filed by Plaintiff Tribe.

4. To reconsider and to set aside the October 5, 1989 Order in Limine "... prohibiting plaintiff from referring to its fraudulent representation claim against the United States Justice Department and former U.S. Attorney Evan L. Hultman, as well as any reference to a 'constricted complaint' or any other direct or indirect reference to its fraud claim," as being totally violative of the Constitution and depriving Plaintiff Tribe its right to a fair and full trial respecting the issues involved in the retrial of the title to the 3590 acres; and

(5) And for such relief as may be proper under the circumstances.

Respectfully submitted,

/s/ William H. Veeder
William H. Veeder
818 18th Street, N.W. #920
Washington, DC 20006
(202) 466-3890

Attorney for
Omaha Indian Tribe

Dated: March 12, 1990

APPENDIX Z
THE UNITED STATES DISTRICT COURT
IN AND FOR THE NORTHERN DISTRICT OF IOWA
FOR THE WESTERN DIVISION

No. C 75-4067

OMAHA INDIAN TRIBE, et al.,

Plaintiffs,

vs.

AGRICULTURAL & INDUSTRIAL
INVESTMENT COMPANY, et al.,

Defendants.

PRE-TRIAL ORDER

TRACT I—BLACKBIRIBEND AREA

I. *The parties agree that the following facts are true and undisputed:* PLAINTIFF TRIBE'S SUMMATION

Agreement among the parties as to the facts which are true and undisputed has been most difficult. Those circumstances prevail due to a myriad of disparate issues arising from the very nature of the proceedings, its long and contentious history, and the fear among the parties that by agreement they would assist the opposition or cripple their own claims to title. Repeated efforts have been made by the Tribe in good faith to meld the proposed true and undisputed facts submitted by the parties into a single coherent presentation. That effort has been found to be impossible. Some phrases in some sentences should be accepted by Tribe as undisputed. However, when read in context, they are objectionable to Plaintiff Tribe and cannot be accepted as "true and undisputed." Indeed, the only uncontroverted facts which Plaintiff Tribe perceives

to be generally acceptable is that presented by Mr. Lohr, Counsel for Defendants McGuire and Barton, in which he states:

"4. Factual issues are:

a. How the Missouri River moved in Monona Bend from 1852 to present.

b. To which land have accretions attached."

Mr. Lohr's statement, albeit in regard to TRACT II, Monona Bend, is applicable to the entire area in litigation. Plaintiff Tribe's True and Undisputed facts are hereafter set forth, followed by the proposed true and undisputed facts of each of the Defendants within the Blackbird Bend Area.

A. PLAINTIFF TRIBE'S PROPOSED TRUE AND UNDISPUTED FACTS

1. There was entered by this Court on May 30, 1987 a Final Judgment and Degree, in which this Court ordered, adjudged, and decreed that Plaintiff Omaha Indian Tribe shall have quieted in it title to 1937.54 acres; Defendant State of Iowa had quieted title in it to 672.93 acres; Defendant John R. Wilson, a personal representative of the Estate of Roy Tibbals Wilson, had quieted title in John R. Wilson 151.15 acres; Defendant R.G.P. Inc., had quieted title in it to 83.26 acres; and title was quieted in Charles E. Lakin and Florence Lakin to 71.34 acres, all of which lands are within the Barrett Meander Line and all of which lands are likewise encompassed within the land area to the north, east, and south by the remaining 3473.78 acres comprising the Blackbird Bend Meander Lobe.

2. Each of the named Defendants Wilson, Lakin, R.G.P., Inc., and Iowa, claims title to lands outside of the Barrett Meander Line, as do Defendants Sorenson. It is important here that, though Defendants Sorenson claimed title to lands within the Barrett Meander Line, the May 30, 1987 Final and Judgment and Decree makes no reference to

Defendants Sorenson. In addition to the named Defendants, to which reference is made above, these Defendants who were not parties to the original trial on the merits giving rise to the May 30, 1987 Final Judgment and Decree and are not bound by it likewise assert claims to title to lands within the Blackbird Bend Meander Lobe outside of the Barrett Meander Line: Edna Boulden Miller, Ethel A. Parks, Myrtle G. Riggs, George Robert Boulden, Jr., Cleo Cox, Ethel McCoy, John J. Craford, M. George Craford, Rose Ann Kane, June Craford Seacat, David G. Craford, Easton Bearce, John H. Lund, Ruth J. Lund, Arthur Orr, George C. Ruth, Anena Ruth, Richard A. Ruth, Jean M. Ruth, W. W. Virtue, Jack D. Virtue, Terence C. Virtue, James T. Craford, Sidney Craford, Robert Orr, Regina Marie Torticilli, Lloyd Fletcher, and Monona County Rural Electric Cooperative.

3. Plaintiff Omaha Indian Tribe of Nebraska has occupied the lands comprising the Omaha Indian Reservation since time immemorial. For over a century and a half, Plaintiff Tribe, in the exercise of its inherent sovereign powers, entered into Treaties with the United States of America. The final Treaty, insofar as is pertinent here between the Tribe and the United States of America, was signed in the city of Washington on March 16, 1854 (10 Stat. 1043). The Treaty with the Omahas is hereafter referred to as the Treaty of 1854.

4. By the Treaty of 1854, Plaintiff Tribe reserved to itself—did not grant to the United States—the Omaha Indian Reservation. That Treaty established the “centre” of the Missouri River as the eastern boundary of the Omaha Indian Reservation. Thereafter the Missouri River, by the process of erosion and accretion, progressed eastward.

5. In 1867 United States Surveyor Barrett meandered the 1867 Missouri River along the Omaha or western bank of the Missouri River, including the area referred to in this litigation as the Blackbird Bend Meander Lobe.

6. As that there were 2900 acres of land, more or less, within the exterior boundary of the Meander Line which he established. Barrett likewise subdivided the lands within the meander line establishing legal subdivisions. Subsequently, those lands were allotted to members of the Omaha Indian Tribe who, for over an extended period of time, occupied the lands within the Blackbird Bend Meander Lobe as meandered by Barrett. Certain of those lands were sold to non-Indians who held title to those allotted lands in fee simple.

7. Subsequent to Barrett's meander of the Blackbird Bend Meander Lobe, the Missouri River continued its eastward progression to the furthest point in that stream's easterly migration.

8. The Court of Appeals for the Eighth Circuit has made this declaration regarding that easterly progression of the Missouri River:

There is no disagreement as to the Tribe's description that: 'The Easterly High Bank is a natural monument demarking the furthest point of progression of the eastern migration of the Missouri River from the eastern boundary of the 2900 acres, as surveyed by Barrett in 1867.

It commences at a point on the Easterly High Bank located approximately ,200 feet south-westerly from the corner common to Sections 20, 21, 28 and 29, T. 84 N., R. 46 W. of the 5th P.M. continuing down said Easterly High Bank a distance of approximately 3 1/2 miles to a point on the

* * *

**II. EXHIBITS TRACE I—BLACKBIRD BEND MEANDER
LOBE**

- A. The parties agree that the following exhibits, identified by the initials of counsel, shall be considered in evidence at trial without further offer, proof or objection.**

PETER J. PETERS, P.C.
233 PEARL STREET
P.O. BOX 938
COUNCIL BLUFFS, IOWA 51502

AREA CODE 712
TELEPHONE 328-3157

September 19, 1989

VIA—UPS

Mr. William H. Veeder
818 18th Street, N.W. #920
Washington, DC 20006

RE: Omaha Indian Tribe v. Agricultural and
Industrial Investment Company, et al.

Dear Mr. Veeder:

I received on September 19 your pleading whereby you transmit a revised list of exhibits of the Omaha Indian Tribe for tracts 1, 2 and 3.

As to tract 1, I have prepared the objections in the space provided or have indicated no objection as appropriate and am returning your list to you with the information typed thereon. I am authorized on behalf of all counsel who have clients in tract 1 to state to you that these are the objections of all of said counsel.

I am returning the exhibit list to you by overnight mail so that you will receive it on September 20.

299a

Yours very truly,

PETER J. PETERS, P.C.

By Peter J. Peters

Peter J. Peters

II. A. The parties hereto agree that the following exhibits identified by the initials of counsel, shall be considered in evidence at trial without further offer, proof or objection:

1. Plaintiff's Exhibits—Defendant's No Objections
6. Treaty with the Omaha Indian Tribe, 1854, at Washington D.C., March 16, 1854, 10 Stat., 1043, Proclaimed June 21, 1954; II Kappler, *Indian Affairs, Laws and Treaties*, pages 611 et seq.
Purpose: Treaty pursuant to which the Omaha Tribe selected its lands.
Objections: No objection
7. Documents respecting the selection by the Omaha Indian Tribe of their Reservation, pursuant to Treaty of 1854.
Purpose: Basis upon which the Omaha Tribe selected its lands.
Objections: No objection.
8. 1855 Survey Plat of exterior boundary of Omaha Indian Reservation, by Deputy Surveyor W. Barnum, General Land Office.
Purpose: The 1855 "Barnum" survey locates the lands selected by the Omaha Tribe for their reservation in accordance with the 1854 Treaty. This survey shows that the Blackbird Bend area was part of the Omaha Indian Reservation which supports the Omaha Tribe's claims.
Objections: No objection.
- 8a. 1855 Field Notes and Legal Description of Omaha Indian reservation, by Deputy Surveyor W. Barnum, General Land Office.
Purpose: These field notes describe the location of the right bank of the Missouri River in 1855

and supports the Omaha Tribe's claims to accretions.

Objections: No objection.

Purpose: The U.S. Corps of Engineer's Missouri River 1940 alluvial plain maps are used to determine the 1943 Iowa Nebraska Compact Line and the limit of this court's jurisdiction.

Objections: No objection.

16. May, 1974, U.S. Army Corps of Engineers' Topographic Maps for the Gavins Point Dam to Rulo, Nebraska Survey Project in the Blackbird Bend Area (7 sheets).

Purpose: These 1974 official U.S. Corps of Engineers' topographic maps includes Tract 1 of this litigation and shows the geography and the location of the Missouri River in the Blackbird Bend, all in support of the Omaha Tribe's claims.

Objections: No objection.

18. Trust and Fee Patents to Omaha Indians (36 documents).

Purpose: To show what lands had trust and fee patents issued on before the Missouri River washed them away.

Objections: No objection

19. Relinquishment of allotted lands to Omaha Indian Tribe; relevant Secretarial Order and regulations (14 documents).

Purpose: Shows the lands in which title was relinquished back to the Omaha Indian Tribe.

Objections: No objection

Appraisal deeds and related documents in sales to non-Indians.

20. Thurston and Burt County Land Transfer Books.

Purpose: Shows dates of last land transfers before land was washed away supporting Omaha Tribe's claim to accretions.

Objections: No objection

26. T-24-N, R-10-E (Plat).

Purpose: This survey plat locates the Missouri River right bank meander line for Township 24 North, Range 10 East in support of the Omaha Tribe's claims.

Objections: No objection

26a. T-24-N, R-11-E (Plat).

Purpose: This survey plat locates the Missouri River right bank meander line for Township 24 North, Range 11 East in support of the Omaha Tribe's claims.

Objections: No objection

26b. Contracts for 1867 Barrett Survey.

Purpose: This contract authorized U.S. Deputy Surveyor Barrett to survey Township 24 North, Ranges 10 & 11 East in the Blackbird Bend area. These townships are part of the Omaha Indian Reservation included in this litigation and supports the Omaha Tribe's claims.

Objections: No objection

26c. Special Instructions for 1867 Barrett Survey.

Purpose: These Special Instructions directed U.S. Deputy Surveyor Barrett as to the method to survey Township 24 North, Ranges 10 & 11 East in the Blackbird Bend area. These townships are part of the Omaha Indian Reservation included in this litigation and supports the Omaha Tribe's claims.

Objections: No objection

- 26d. T-24-N, R-10-E Field Notes of 1867 Barrett Survey.

Purpose: These field notes describe the geography, the distances and bearings surveyed by U.S. Deputy Surveyor T. Barrett in 1867 to locate the section lines of Township 24 North, Range 10 East within the Omaha Indian Reservation and the Missouri River right bank meander line in the Blackbird Bend area which supports the Omaha Tribe's claims.

Objections: No objection

- 26e. T-24-N, R-11-E Field Notes of 1867 Barrett Survey.

Purpose: These field notes describe the geography, the distances and bearings surveyed by U.S. Deputy Surveyor T. North, Range 11 East within the Omaha Indian Reservation and the Missouri River right bank meander line in the Blackbird Bend area which supports the Omaha Tribe's claim.

Objections: No objection

29. 1879 Missouri River Commission Survey Maps, sheet No. 26 and original work sheets (6 sheets).

Purpose: These Missouri River Commission work maps show the geography and location of the 1879 Missouri River in the Blackbird Bend area and the accretions to the 1867 Barrett meander line in support of the Omaha Tribe's claims.

Objections: No objection

* * *

32. 1890 Missouri River Commission Survey, sheet No. 26 published 1893.

Purpose: These printed Missouri River Commission maps show the geography and location of

the 1890 Missouri River in Tract 1 of this litigation in support of the Omaha Tribe's claim to accretions to the Omaha Indian Reservation extending toward the Iowa northerly high bank.

Objections: No objection

35. 1923 U.S. Army Corps of Engineers' Missouri River Survey Map, sheet Nos. 40 & 41.

Purpose: This map shows the 1923 geography and location of the Missouri River in the Blackbird Bend area after the river avulsed from the 1912 Iowa northerly high bank in support of the Omaha Tribe's claims.

Objections: No objection

36. 1927 U.S. Army Corps of Engineers' Missouri River Survey Map, sheet No. 62.

Purpose: This map shows the 1927 geography and location of the Missouri River in the Blackbird Bend area in support of the Omaha Tribe's claims.

Objections: No objection

37. 1928 U.S. Army Corps of Engineers' Missouri River Survey Map, sheet No. 62 made from aerial photography.

Purpose: This map shows the 1928 geography and location of the Missouri River in the Blackbird Bend area in support of the Omaha Tribe's claims.

Objections: No objection

38. U.S. Army Corps of Engineers' 1928 aerial photography for the Blackbird Bend Area.

Purpose: This 1928 black and white U.S. Corps of Engineers' aerial photography for the Blackbird Bend area shows the geography, the location of the Missouri River channel at the toe of the

305a

Iowa northerly high bank in support of the
Omaha Tribe's claims.

Objections: No objection

III. WITNESSES

A. Plaintiffs' Witnesses: [List names, addresses and substances of testimony.]

Doran L. Morris, Chairman
Omaha Indian Tribe of
Nebraska
P.O. Box 368
Macy, Nebraska 68039
(402) 837-5391

Elmer M. Clark
Professional Land Surveyor and
River Morphologist
10052 East Cinnabar Ave.
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Doyl G. Abrahamson
Professional Land Surveyor and
Title Researcher
Merrick and Company
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Edward L. Cline Former
Chairman of the Omaha Indian
Tribe of Nebraska
P.O. Box 368
Macy, Nebraska 69093
(402) 837-5391

Dr. Charles S. Robinson
Geological Engineer,
Geohydrologist And River
Morphologist
5265 McIntyre
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Charles P. Corke
11401 Lakin Place
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George S. Gorsuch
Land Mangement Consultant,
Dendrochronology Expert
854 West Battlement Parkway,
B107

Parachute, Colorado 81635
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PLAINTIFF TRIBE'S LIST OF WITNESSES

DORAN L. MORRIS, CHAIRMAN
OMAHA INDIAN TRIBE OF NEBRASKA
 P.O. Box 36
 Macy, Nebraska 68039
 (402) 837-5391

Chairman Morris will testify as to the unvarying efforts on the part of the Omaha Indian Tribe to recover the lands in TRACT I, Blackbird Bend Meander Lobe, TRACT II, Monona Bend, and TRACT III, Omaha Mission Bend from the squatters who have been and are now trespassing upon those lands, title to which resides in Plaintiff Tribe. Chairman Morris will testify that the Tribe's claims to title is based upon its Treaty of 1854, pursuant to which the Omaha Indian Tribe retained its title, did not cede its title to the lands within the Reservation and the accretions to those lands to the United States of America. Chairman Morris will likewise testify to the long-term efforts of the Morris family and of the Chairman personally to recover the lands which rightfully belong to the Omaha Indian Tribe.

EDWARD L. CLINE, FORMER CHAIRMAN OF THE
OMAHA INDIAN TRIBE OF NEBRASKA
 P.O. BOX 368
 MACY, NEBRASKA 68039
 (402) 837-5391

Mr. Cline will testify as to his personal involvement over the last quarter century in seeking to recover for the Omaha Indian Tribe, for which he was previously Chairman, the lands in TRACT I, Blackbird Bend Meander Lobe, TRACT II, Monona Bend, and TRACT III, Omaha Mission Bend, those lands being part of the Omaha Indian Reservation. Based upon his personal experience, Mr. Cline will testify that, commencing in the early 1960s, he began the assembly of historical and documentary information to sup-

port the Tribe's title to the lands involved in this litigation. Mr. Cline will further testify with particular reference to the Tribe's efforts together with those of the Bureau of Indian Affairs, to recover for the Tribe the lands referred to above.

ELMER M. CLARK,
PROFESSIONAL LAND SURVEYOR AND RIVER
MORPHOLOGIST
10052 East Cinnabar Ave.
Scottsdale, AZ 85258
(602) 860-0034

Mr. Elmer M. Clark, nationally recognized river morphologist, professional land surveyor, and photogrammetrist is a principal witness in the location of the lands involved in this litigation title to which is claimed by the Omaha Indian Tribe. Mr. Clark has investigated the recorded movements of the Missouri River and the basic research in regard to the location of the Omaha Indian Reservation lands subsequent to the 1854 Treaty as they relate to the Missouri River throughout the period of history dating from 1852 to 1989. Mr. Clark will testify with precision and exactitude as to the various locations of the Missouri River from two years prior to the Omaha Indian Treaty of 1854 to date. Mr. Clark has had the prime responsibility of working with Mr. Charles P. Corke and Dr. Charles S. Robinson to analyze and plot the exact location of the middle of the principal channel of the Missouri River throughout the history of that stream until the year 1943 when the Iowa-Nebraska Compact Boundary was agreed to between the states. After that date Mr. Clark's studies of the Missouri River continued, working closely with the Corps of Engineers. His investigations were directed particularly to that part of the river being within the jurisdiction of Iowa predicated upon the 1943 Boundary Compact Line, a factor of principal value in the development of the case of the Omaha Indian Tribe. Mr. Clark has accomplished a reconciliation of the various scales from

the numerous maps that were prepared throughout the history to which reference has been made. By reconciling these scales it has been possible for Mr. Clark precisely to locate the Missouri River within the area of litigation on the face of the earth not only as it pertained to the cadastral surveys but likewise as it pertained to the navigation and hydrologic studies which were conducted sometimes contemporaneously with the cadastral surveys. Mr. Clark's expertise in this area, for the purpose of defining the location of the middle of the principal channel of the Missouri River at various times, helped accomplish a most vital work in establishing the pertinent and controlling facts.

Historically and to a relative recent date the Missouri River frequently was out of control and inundated large area of land which are the subject matter of this case. From the historic river locations, Mr. Clark has plotted the principal course of these various channels throughout the area in litigation.

Equally important Mr. Clark has developed, while working with Messrs. Corke and Robinson, the basic data from the public records of the Missouri River throughout its history. In connection with the hydrologic development of the historic flow, Mr. Clark is prepared graphically to demonstrate the early high and low water cycles of the river and their effect upon the lands here involved. These records will also show that in later years the upstream control and large impoundments of water led to altered run-off characteristics of the Missouri River resulting in substantial and permanent subsidence of water levels in the Blackbird Bend area. In summary, Mr. Clark has prepared base maps, photomaps and hydrographs to present accurately the historic Missouri River channels and hydrographs to demonstrate the consequences of these river channel movements and changing hydrologic data. An additional factor of Mr. Clark's work was to provide a common base accurately to present and relate the geology, hydrology and

other scientific exhibits from Dr. Charles S. Robinson to be offered in evidence by the Omaha Indian Tribe in support of their claim in these cases.

DR. CHARLES S. ROBINSON,
GEOLOGICAL ENGINEER, GEOHYDROLOGIST, AND
RIVER MORPHOLOGIST

5265 McIntyre
Golden, Colorado 80403
(303) 279-3136

Dr. Charles S. Robinson is a nationally known geological engineer, geohydrologist, and an expert in the field of river morphology. Dr. Robinson has applied these fields to the investigations that he has conducted in the preparation of the case of the Omaha Indian Tribe all as asserted in the Tribe's case of Civ. 75-4067. Dr. Robinson will testify based upon his work, and in coordination with the work of Elmer M. Clark, as to the exact location of the channel of the Missouri River as it pertains to each of the historic rivers that have been investigated in the preparation of the case for the Omaha Tribe to support its claim to the lands in question. This has entailed an indepth study of the surficial geology of the area in question. In particular, a study was made of the distribution of sediments related to river morphology and, as a result, the definition of the location of the thalweg of the Missouri River during each period that was selected, based on available historical data. For example, Dr. Robinson's study of the 1856 navigation channel as related to the 1852 Anderson survey is demonstrative of the ability to correlate a cadastral survey and a navigation survey, conducted entirely independent of one to the other, and the surficial geology to establish the position and extent of the Missouri River at the time of the survey. In that connection, his work with Elmer M. Clark, has been extremely important by reason of the fact that there has been a composite of the two sciences; that is, the science of surveying and mapping and the science of river morphology, making it possible for Dr.

Robinson to confirm by geologic studies the precise location of the river at each point in time. It is likewise possible for Dr. Robinson, working with Mr. Clark, to locate throughout the period here involved, namely 1852 to 1989, the lands of the Omaha Indian Tribe that at all times have been intact irrespective of the vagaries of the Missouri River. An extremely important part of the investigations conducted by Dr. Robinson has been the determination of the relationship of the stream flow of the Missouri River throughout historic time to the location of the river. The studies have included analyses of river movement and studies of sediment deposition in relation to the location of the land and the effect of river movements upon the land. The primary aspect of these studies has been the correlation between the erosion on the outer curve of the meandering river and the deposition of accretions on the inner curve of the meandering river. Dr. Charles S. Robinson will testify with precision as to the geology, geohydrology, dendrochronology, and river movements throughout the period of the studies that extends approximately from the 1854 Treaty with the Omaha Indian Tribe down to date.

DOYLE G. ABRAHAMSON
PROFESSIONAL LAND SURVEYOR AND TITLE RE-
SEARCHER
MERRICK AND COMPANY
10855 East Bethany Drive
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Denver, Colorado 80222
(303) 751-0741

Mr. Doyle G. Abrahamson will testify in support of the claims of the Omaha Indian Tribe that he has made indepth investigations as an expert in the records of Monona County and in Federal records for the purpose of determining the facts which relate to the claim of title of each of the principal defendants. This involves testimony by Mr. Abrahamson as to records in Thurston and Burt Counties, State of Nebraska and Monona County, State of Iowa. In

great detail and depth Mr. Abrahamson has investigated the real property records, and tax records and the assessor's records in Monona County to delineate and determine the character of the land throughout the history of those properties. In every case he has made an investigation on the basis of the earliest available records to determine if there have been any significant matters of record or changes of record that could affect the claims in question. He has likewise made indepth research and investigations of land titles as they relate to the river movements developed by Dr. Charles S. Robinson and Elmer M. Clark thus bringing together the local records and the Federal records as they pertain to the river morphology pertinent to the litigation. It is also an important part of the testimony of Doyle G. Abrahamson that he is a professional land surveyor and has himself undertaken surveys in the area in litigation. Mr. Abrahamson will testify upon personal knowledge as to the kind and type of survey that was undertaken by Barrett, the location of the lands surveyed by Barrett, and Elmer M. Clark's retracement of Barrett's Meander Line that has been offered in evidence by the Omaha Indian Tribe. Mr. Abrahamson will likewise testify respecting the correlation of the early titles of the Omaha Indian Reservation including, but not limited to, the 1854 title to the Omaha Indian Reservation and with the land titles stemming from patents issued in the State of Iowa based upon the Anderson survey of 1852. He has likewise made an investigation of the claims of Peterson and Lakin who apparently derived their title from Joe Kirk who in some manner set claim to the lands within the Indian Reservation and became the conveyor to Peterson and Lakin. Mr. Abrahamson's background in connection with both land titles and land surveys will bring him into a broad scale of testimony in this litigation.

CHARLES P. CORKE,
11401 Lakin Pl.

Oakton, VA 22124
(703) 620-3678

Mr. Corke, is the former official of the Department of the Interior, Bureau of Indian Affairs, now a private consultant, who was directed by the officials in the Department of the Interior to supervise and assist in the recovery by the Omaha Indian Tribe of the lands constituting the subject matter of these cases. It was Mr. Corke who prepared and required the high standards of technical performance by those who contracted with the Omaha Indian Tribe to establish its claims to the lands here involved. Mr. Corke directed, reviewed and approved the acceptability of the investigations upon which the Tribe's claims are predicated. Mr. Corke conducted investigations as to historic documents and the records of the title plants and other units of the Bureau of Indian Affairs which disclose ownership of lands of the Omaha Indian Tribe held in trust by the United States of America for the Omaha Tribe. Mr. Corke will testify with authority, in view of the fact that the title plants for a great many years were under his direction, and it was under his direction that the proof of title to these lands as disclosed by the records of the Bureau of Indian Affairs were established. He has likewise a unique background on the history of the investigation of the specific titles that have been made a matter of issue in these cases.

Mr. Corke will testify as to the all-out efforts of the United States of America acting throughout the principal agent of the Trustee, Bureau of Indian Affairs, to assist the Omaha Indian Tribe in the recovery of the Tribe's lands which are referred to as the Blackbird Bend and other areas. Mr. Corke's efforts in these investigations both on the land and in the records will disclose that at all times the United States of America, Trustee for the Omaha Indian Tribe, held title as Trustee to the lands for and behalf of the Indian Tribe and that at no time was there a re-

linguishment of those properties by the Trustee nor was there legal authority for that relinquishment.

As director of all technical investigations which have been conducted since 1973, Mr. Corke will testify as to the results of those investigations which very substantially and conclusively verify the claims of the Omaha Indian Tribe that the properties in question are part of the Treaty lands of the Omaha Indian Tribe. In connection with those technical investigations, Mr. Corke will testify as to the close supervision he at all times exercised over the professional surveyor, the geohydrologist-geologist and surveyor-researcher with the objective of fulfilling the responsibilities of the United States of America, Trustee owing to the Omaha Indian Tribe in these cases.

THOMAS M. WATSON
TECHNICAL RESOURCE CORPORATION
1820 11th Avenue
Helena, Montana 59604
(406) 449-7082

Mr. Watson is a nationally recognized Engineer/Hydrologist who has intensively studied the hydrology of the Missouri River, particularly as it relates to the 11,300 acres of land contained in TRACTS I, II, and III, title to which is the subject *res* of this litigation. Mr. Watson's testimony, predicated upon his personal knowledge of the area in litigation, will be offered with particular reference to the morphology of the Missouri River, the abandoned channel of the River establishing the avulsive movement of that stream, and related issues. Mr. Watson has personal and indepth knowledge as an irrigation engineer of the area here involved as it relates to soil productivity, drainage, and related factors. Mr. Watson has intensively studied the record in this case and will be utilized to testify in any new areas in the field of river morphology which Defendants may bring up in support their claims.

Because Mr. Watson's qualifications do not appear in the trial on the merits, there is attached Mr. Watson's curriculum vitae.

GEORGE S. GORSUCH,
LAND MANAGEMENT CONSULTANT, DENDRO-
CHRONOLOGY EXPERT

854 West Battlement Parkway, B107
Parachute, Colorado 81635
(303) 285-7484

George S. Gorsuch is a nationally recognized Land Management expert and Forester. His many years in public and private practice in Forest Management has brought to the fore his expertise in the science of the determination of the age of threes, dendrochronology. Mr. Gorsuch is coordination with the geologic and river morphological studies of Dr. Robinson, has made an exhaustive study of the age of the trees on the Omaha Indian Tribal Lands, claim to which is asserted in the Tribes' case C-75-4067. Mr. Gorsuch will testify, if required, as to the age of the trees as a factor in establishing the validity of the claims of Plaintiff Tribe to the lands here involved. (Plaintiff Tribe will use Mr. Gorsuch's testimony from the record in the "consolidated cases" due to the fact that he cannot be available for the trial.

IV. FACTUAL ISSUES

A. Plaintiff's Factual Issues:

1. Plaintiff Omaha Indian Tribe will establish the historical and geographical facts pertaining to the Omaha Indian Reservation dating back beyond the Louisiana Purchase and the explorations by Lewis and Clark involving the Ancient Tribal Homeland of the Omaha Indian Tribe. Plaintiff Tribe will likewise by means of documentary evidence and oral testimony establish the location of the Omaha Indian Reservation at the time of the 1854 Treaty.

2. The numerous surveys conducted by the United States of America, acting by and through agents of the General Land Office, together with field notes, maps, and plats, will establish the Omaha Indian Reservation as it was originally located with its eastern boundary being the "centre" of the main channel of the Missouri River. Proof will be offered of the Anderson Survey of 1852 pursuant to which the eastern bank of the Missouri River was meandered and the subsequent surveys on the western or Omaha bank of the River by Barnum, Hopkins, Haddock, Barrett, Peterson, and others.

TRACT I, Blackbird Bend

3. There are graphically displayed on Plate I followed p. the area to which Plaintiff Tribe asserts title within TRACT I, the Blackbird Bend Meander Lobe. The morphology of the Missouri River beginning in 1854 down to date will constitute the primary proof upon which Plaintiff Tribe will rely in establishing its claim to title to the land west and south of the Northerly and Easterly Iowa High Banks.

4. Subsequent to 1854, when the Omaha Indian Reservation was established, the Missouri River eroded the east or Iowa bank of that stream, destroying the Iowa bank as surveyed by Anderson in 1852, while simultaneously depositing silt and sand against the right bank of the

Missouri River which accretions attached to and became a part of the Omaha Indian Reservation lands as the Missouri River continued its eastward progression.

5. The eastward progression of the Missouri River continued after 1854 until 1875 when the Missouri River reached the Iowa Easterly High Bank, a natural monument, as described in the proposed true and undisputed facts, at the toe of which there is today located the 1875 abandoned channel of the Missouri River.

6. Throughout its eastern progression, the Missouri River at all times accreted to the western or Omaha Bank of the Missouri River, adding lands to the Omaha Indian Reservation, while eroding away the left or Iowa bank of that stream.

7. During the year 1875 or immediately thereafter, the Missouri River avulsed away from the 1875 channel and occupied the 1879 channel of the Missouri River which became the main channel of that stream. That 1875 avulsion of the Missouri River left a clearly defined and identifiable channel which today separates the Omaha Blackbird Bend Meander Lobe from the Iowa lands east of that channel. The avulsive action of the Missouri River between 1875 and the new channel of 1879 completely and permanently severed 1500 acres of Omaha Indian land east of the 1879 Missouri River channel, leaving intact that very substantial area of 1500 acres of Omaha Indian Reservation land east of the 1879 channel.

8. It is important that the 1879 channel was developed by a point-bar cutoff occupying an area of land described by Barrett in 1867 as a small low depression within the Barrett Meander Line. After that avulsion, the Missouri River, in its course across the Blackbird Bend Meander Lobe, flowed within the Omaha Indian Reservation.

9. The Missouri River between 1879 and 1890 commenced a northerly migration, eroding away the left or

Iowa bank, as surveyed by Anderson in 1852, accreting to the right or Omaha bank of the Missouri River by depositing silt and sand against the Omaha Indian Reservation land. By that process of erosion and accretion in its northerly migration, lands were added to the Omaha Indian Reservation in identically the same manner as lands were added to the Omaha Indian Reservation when the Missouri River progressed to the Easterly Iowa High Bank between 1867 and 1875.

10. Subsequent to 1890, the Missouri River continued its northerly and northeasterly progression, eroding and destroying the Iowa left bank of the Missouri River and depositing accretions to the Omaha Indian Reservation. That northerly progression of the main stream of the Missouri River continued until 1912.

11. In its northerly and northeasterly migration, the Missouri River created the Northerly Iowa High Bank in the same fashion that it established the Easterly Iowa High Bank by the 1875 Missouri River. Both the Northerly and Easterly High Banks are today clearly identifiable natural monuments.

12. At the toe of the Northerly Iowa High Bank is the deeply incised and clearly identifiable abandoned channel of the 1912 River which separates the Iowa lands from the Blackbird Bend Meander Lobe which is part of the Omaha Indian Reservation.

13. During the period from 1912 to 1923, the Missouri River by a series of avulsive movements, left the Northerly Iowa High Bank and proceeded southward across the Omaha Indian Reservation. All movements of the Missouri River within the Blackbird Bend Meander Lobe, subsequent to the 1912 avulsions, have been within the Omaha Indian Reservation. Moreover, the 1923 Missouri River became a braided stream with constantly shifting channels.

14. In the mid-1930s the United States Corps of Engineers initiated a comprehensive program to control,

lower, and channelize the Missouri River on the Omaha Indian Reservation within the Blackbird Bend Meander Lobe. The work of the Corps of Engineers has continued to the present time.

15. During the long period of occupancy of the Blackbird Bend Meander Lobe by Plaintiff Omaha Indian Tribe and its members, who had allotments within the Blackbird Bend Meander Lobe, there was frequent flooding and, indeed, by reason of the flowing, the members temporarily moved from the Blackbird Bend Meander Lobe. The control, lowering, channelization, and impoundment of the Missouri River, referred to immediately above, had a most salutary effect upon the lands within the Blackbird Bend Meander Lobe by not only ending the frequent flooding of that area but also by draining the water from the land. Irrespective of the fact that the members of the Omaha Tribe had temporarily ceased to occupy the lands in the Blackbird Bend Area, this Court not only acknowledged the longtime occupancy of Plaintiff Tribe and its members of the Blackbird Bend Meander Lobe, it acknowledged in its June 5, 1975 Order, in these terms that their claim to the Blackbird Bend Meander Lobe was never abandoned:

The record reflects that members of the Tribe have never totally acquiesced in Defendants' use of the land, and the Monona County Assessor felt unsure enough of the status of the title to omit these lands from the tax rolls for many years. Perhaps the true uncontested status was many years ago before the Missouri River changed its course.

16. It was not until the Corps of Engineers commenced its upstream impoundment on the Missouri River and drained the Blackbird Bend area by deepening the channel of the Missouri River that the Defendant squatters/speculators entered upon the lands within the Blackbird Bend Area, repeated vast profits from that land, and maintained

their possession of it. Moreover, Defendants received subsidies from the Department of Agriculture, and otherwise which, coupled with the vast subsidies stemming from the upstream impoundment and channelization of the River by the Corps of Engineers, greatly benefited the squatters/speculators with minimum expenditures on their part.

* * *

VI. Legal Issues

A. Plaintiff Tribe's Legal Issues

1. Plaintiff Tribe incorporates into these "Legal Issues" all of Plaintiff Tribe's "Legal Contentions" set forth above because markedly they can all be categorized as legal contentions or legal issues.

2. The presumptions in the laws of Iowa respecting accretions have no application to Plaintiff Tribe due to its immunity from state law, all as stated above. The laws of Nebraska, which were "borrowed" by the Supreme Court in *Wilson v. Omaha* are part of the paramount federal law stemming from the Constitution, laws, and treaties of the United States.

3. A critical legal issue is the application of 25 U.S.C. 194 as it pertains to the burden of proof which must be assumed by the Defendants in this case. The previous rulings respecting the Barrett Meander Line litigation have "... no bearing whatsoever on the Tribe's claim to any land outside the boundary of the original reservation which is defined by the Barrett Survey [sic-meander line]."¹

4. The "centre" line of the Missouri River was constituted the boundary of the Omaha Indian Reservation by the Treaty of 1854 and the Barrett Meander Line did not change that boundary.²

5. An issue to be resolved is whether Defendant State of Iowa, primary beneficiary of the fraud practiced upon Plaintiff Tribe, can succeed in suppressing the issue of the forced, fraudulent representation upon Plaintiff Tribe by Evan L. Hultman, United States Attorney, who denied Plaintiff Tribe's title to the lands claimed by Defendant Iowa in the original trial on the merits. Evan L. Hultman,

¹ *Omaha v. Agricultural*, 854 F.2d 1089, 1096, n. 6 (CA 8, 1988) and the authorities there cited.

² *Harden v. Jordan*, 140 U.S. 371, 380 (1891).

as former Attorney General for Defendant Iowa, "sold out" the interests of Plaintiff Tribe for the benefit of his former client Defendant Iowa in the case of *United States v. Wilson*. Hultman, acting in close concert with Myles E. Flint and other attorneys in the Department of Justice, filed the fraudulent complaint in *United States v. Wilson* constricting Plaintiff Tribe's claims to the lands within the Barrett Meander Line and "excepting" lands claimed by Defendant Iowa in these proceedings.³

6. Plaintiff Tribe presents the legal issues of whether Plaintiff Tribe can be bound by the forced fraudulent representation by Evan L. Hultman, United States Attorney, Myles E. Fling, Deputy Assistant Attorney General, James J. Clear and other participants in the fraud. A related legal issue is whether Defendant Lakin and Defendant R.G.P., Inc., who participated in dividing up the Blackbird Bend Meander Lobe, acting in concert with the then Attorney General Evan L. Hultman, can now be a beneficiary of that fraud upon Plaintiff Tribe.

7. A critical legal issue pertains to the requirement by this Court that Plaintiff Tribe, which fully tried all aspects of the Blackbird Bend litigation against Defendants Lakin, Wilson, R.G.P., Inc., Iowa, Jackson, Peterson and Sorenson can once again be forced to retry those issues against the named Defendants. Plaintiff Tribe does not raise that issue against Defendants Edna Boulden Miller, *et al.*, who though claiming lands in the Blackbird Bend Meander Lobe, were not before the Court in the original trial on the merits.

8. Plaintiff Tribe, having fully tried all of the issues involving the Blackbird Bend Meander Lobe, with the full participation and full consent of the Court and the above

³ *Fiske v. Buder*, 125 F.2d 841, 848-849 (CA 8, 1942; *cert.den.* 273 U.S. 756 (1942); *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 249-250 (1944).

named Defendants,⁴ with the exception of Defendants Edna Boulden Miller, *et al.*, presents the legal issue that where a matter has been fully tried, as here, the pleadings and pre-trial orders are amended to comport with the issues that were actually tried, precluding Plaintiff Tribe being forced to relitigate the issues. That legal issue is most relevant where, as here, Defendants Lakin, Wilson, R.G.P., Inc., Iowa, *et al.*, pleaded and undertook unsuccessfully to prove that the Blackbird Bend Meander Lobe had been totally washed away and replaced by accretions to the Iowa riparian bank. Defendants, having lost on that issue in the original trial, are bound by that decision and by the principles of *res judicata*. As a consequence, Plaintiff Tribe should not be forced to retry those issues against the parties in the original litigation.⁵

9. The Court in the original proceedings denied Plaintiff Tribe the right to be heard on the issue of fraud.⁶ The Court of Appeals likewise suppressed the issue precluding a hearing on it. In the retrial of the case—that issue being all pervasive—Plaintiff Tribe again raises the issue of forced, fraudulent representation, stating that, as in *Fiske v. Buder*, the lapse of time, particularly under the circum-

⁴ *Federal Rules of Civil Procedure*, Rule 15(a).

⁵ *Block v. Commissioner*, 99 U.S. 686, 693 (1878). See also *Partmar Corp. et al., v. Paramount Pictures, et al.*, 347 U.S. 89, 100-103 (1954); *Montana v. United States*, 440 U.S. 147, 153 (1979): "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies based upon the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation." (Emphasis supplied). Those principles were applied against the Tribe in *Oglala Sioux Tribe v. Homestate Min. Co.*, 722 F.2d 1407, 1413 (CA 8, 1984); Vol. 18, *Federal Practice and Procedure*, Sec. 4421-Necessarily Decided, p. 192, *et seq.*; 1987 Pocket Part, 4421. Issue Preclusion. *Restatement (Second) Judgment*, para. 27, p. 250; *Omaha v. Wilson*, 575 F.2d 620, 639 (CA 8, 1978).

⁶ Transcript March 9, 1987; Transcript May 1, 1987.

stances prevailing here, cannot and does not cure the inceptive fraud which can be raised at any time.⁷ Defendant Iowa—which predicates its claim to title on the inceptive fraud, as do the other Defendants in the original trial on the merits who either participated in the fraud or are the beneficiaries of it—cannot, at this time, preclude Plaintiff Tribe from being heard in this retrial on the merits respecting Tribe's charges of forced, fraudulent representation by Defendants Iowa's former Attorney General.

10. At the retrial on the merits respecting the Blackbird Bend Meander Lobe outside the Barrett Meander Line which is being forced upon Plaintiff Tribe before a non-Indian jury, Plaintiff Tribe has the legal right to offer facts respecting the forced, fraudulent representation antecedent to any other issue being heard or tried.

⁷ *Fiske v. Buder*,

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

C 75-4067

OMAHA INDIAN TRIBE

Plaintiff,

v.

AGRICULTURAL & INDUSTRIAL INVESTMENT CO., et al.,
Defendants.

PRE-TRIAL ORDER
TRACT II, MONONA BEND
TRACT III, OMAHA MISSION BEND

I. The parties agree that the following facts are true and undisputed:

A. Plaintiff Tribe's True and Undisputed Facts.

Agreement among the parties has to the facts which prevail in TRACT II, Monona Bend and TRACT III, Omaha Mission Bend does not appear to be possible. That fact prevails by reason of the contentions of the respective parties. Plaintiff Tribe asserts that the entire area in Monona Bend and in Omaha Mission Bend, to which Plaintiff Tribe claims title, was totally obliterated, washed away, and replaced by accretions to the Omaha right or western bank of the Missouri River.

Defendants assert that they deraign their titles from patents either from the National Government or from Defendant State of Iowa. Serious issue has been joined among the parties both as to facts and law. It is asserted by Plaintiff Tribe, as a matter of law, that whatever title may have been acquired through patents or otherwise an-

tecedent to the obliteration of the lands in question, the title of those lands was likewise destroyed, all as set forth in Plaintiff Tribe's legal contentions and legal issues.

As referred to in Plaintiff Tribe's summation respecting the true and undisputed facts respecting TRACT I, Blackbird Bend Defendants McGuire and Barton have summarized the factual issues upon which there is agreement. That statement is as follows:

"4. Factual issues are:

- a. How the Missouri River moved in Monona Bend from 1852 to present.
- b. To which land have accretions attached."

There follows the "True and Undisputed Facts" that have been submitted by the Defendants as they pertain to TRACT II, Monona Bend and TRACT III, Omaha Mission Bend.

B. Defendants' True and Undisputed Facts.

Defendant Agricultural

- A. By Treaty with the Omaha, 1854, 10 stat 1043, plaintiff Tribe ceded all their claims to lands east of the Missouri River to the United States.
- B. Agricultural is in possession and is the record titleholder of the real estate described on Exhibit 1 attached.
- C. U.S. Patents were issued to lands in Sections 35 and 36, Township 85, Range 47, and Section 2, Township 84, Range 47, and Agricultural's title derives from those patents and accretions thereto.
- D. Fee patent No. 206058 was issued to George F. Phillips on June 12, 1911 conveying the S-1/2 SW-1/4 Section 17, T. 25 N., R. 10 E., 6th P.M., Nebraska.

- E. Fee patent No. 116577 was issued to Theresa Morgan Blackbird on March 10, 1910 conveying the S-1/2 NE-1/4 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska.
- F. Fee patent No. 116753 was issued to Henry Furnas on March 10, 1910 conveying the NE-1/4 SW-1/4 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska.
- G. The NW-1/4 SW-1/4 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska was conveyed to John R. House by deed executed by the heirs of Millie Grier, which deed was approved by the Department July 20, 1908.
- H. Fee patent No. 17819 was issued to Minnie F. Saunsoci, a/k/a Ponenson Furnas, October 5, 1908 conveying Lot 3 (SW-1/4 SW-1/4) Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska.
- I. Fee Patent No. 116733 was issued to Jefferson Wolf March 10, 1910 conveying SE-1/4 SW-1/2 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska.
- J. Lots 1 and 2, Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska were conveyed to Frank B. Hutchens by deed executed by Alfred Phillips and Victoria Wood Phillips, his wife, dated June 6, 1903, which deed was approved by the Department on July 2, 1903.
- K. The W-1/2 SE-1/4 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska was conveyed to John R. House by a deed executed by the heirs of Lucy Phillips dated July 20, 1904 approved by the Department April 25, 1906.
- L. The NW-1/4 Section 20, T. 25 N., R. 10 E., 6th P.M. Nebraska was conveyed to John R. House by deed approved by the Department March 14, 1906.

- M. Fee patent No. 116730 was issued to Harry Parker March 10, 1910 conveying the N-1/2 SE-1/4 Section 18, Township 25 N., R. 10 E., 6th P.M. Nebraska.
- N. Fee patent No. 116725 was issued to Samuel Parker March 10, 1910 conveying the S-1/2 SE-1/4 Section 18, Township 25 N., R. 10 E., 6th P.M. Nebraska.
- O. Fee patent No. 41891 was issued to O. B. Phillips January 21, 1909 conveying Lots 1 and 2 Section 21, T. 25 N., R. 10 E., 6th P.M. Nebraska.
- P. Prior to the filing of the complaint in this case plaintiff, nor anyone acting on behalf of plaintiff; ever made a demand on Agricultural or its predecessors in title, for possession of or title to the land of Agricultural claimed by plaintiff in its complaint.
- Q. In October 1929 Plaintiff owned no land riparian to the Missouri River in Sections 21, 28, 27 Township 25 N., R. 10 E., 6th P.M. Nebraska.
- R. The Plaintiff has never had possession or occupancy of the land described in Exhibit 1 attached since the Treaty of 1854.
- S. The United States acts in the capacity of Trustee of the Omaha Indian Tribe's reservation lands. The United States, as Trustee, has never had possession or occupancy of the land described in Exhibit 1, attached, nor has it ever made any claim to these lands as Trustee for the Tribe.
- T. The land described in Exhibit 1 is within the jurisdiction of the State of Iowa.
- U. The Plaintiff's Complaint in C75-4067 filed October 6, 1975, admits that the defendants had been in possession for more than forty years.

- V. The Iowa statute of limitations for real property actions requires that they be brought within ten years.

DEFENDANTS McGUIRE & BARTON

1. The following facts are true and undisputed:

a. By Treaty with the Omaha Tribe in 1854 (10 Stat. 1043), Plaintiff ceded all its claims to lands east of the Missouri River to the United States.

b. James McGuire is the Partition Referee in Monona County Equity No. 18958 which action concerns the SE-1/4 of Section 26; and S-1/2 NW-1/4, and N-1/2 SW-1/4, and SW-1/4 SW-1/4 of Section 25; all in Township 85 North, Range 47, Monona County, Iowa. Myron Barton is the Executor of the Estate of Maude Hudgel. Maude Hudgel died owning an interest in the real estate involved in Monona County Equity No. 18958.

DEFENDANTS EDNA BOULDEN MILLER, *ET AL.*

(Plaintiff Tribe objects and observes that Defendants' Miller, *et al.*, true and undisputed facts are substantially the same as the true and undisputed facts submitted by Defendants Wilson, *et al.*, in regard to TRACT I.)

A. On March 16, 1854, the Omaha Indian Tribe entered into a Treaty with the United States in which certain lands in the then Territory of Nebraska, in an area known as Blackbird Bend, Monona Bend and Omaha Mission Bend, hereafter "the Bends" were reserved by the Tribe as part of an agreement which ceded to the United States all of the land west of the "center of the main channel of said Missouri River". Act of March 16, 1854, Article I. 10 Stat. 1043.

B. Pursuant to this Treaty, the Tribe selected a tract of land to be the Omaha Indian Reservation, which in-

cludes the present-day Omaha Reservation. The Reservations was thereby established in May of 1855. The thalweg of the Missouri River constituted at that time the common boundary between the Omaha Indian Reservation and the State of Iowa.

C. In 1867, the Omaha Reservation lands in the Bends area were surveyed by T. H. Barrett, on behalf of the General Land Office of the United States. The "Barrett Survey", among other things, established the meander line for the Nebraska shore, or the right bank, of the Missouri River in the Bends area.

D. The outermost limit of the Bends area (within which the 1867 Barrett Survey located the right bank meander line of the Missouri River to the west of which lay the Omaha Reservation in 1867), is defined by the Easterly and Northerly High Banks.

E. The Easterly High Bank is a natural monument marking the furthest point of progression of the eastern migration of the Missouri River in the Bends area.

F. The Northerly High Bank is a natural monument marking the furthest migration northward of the Missouri River in the Bends area.

G. At the time the Omaha Reservation was established in 1855, the reservation land within the Bends was situated on the west side of the Missouri River. By 1923, the river had moved to the west of the original boundary line of the reservation.

H. The lands claimed by the Tribe in this case lie between the 1867 line as surveyed by Barrett and a claim line which the Tribe has pleaded coincides with the Northerly and Easterly High Banks.

I. Subject only to the claims of the Omaha Indian Tribe the validity of which they deny, the undersigned defendants, Edna Boulden Miller, et al are the owners in

fee simple of lands claimed by the Tribe. These Defendants and their predecessors in title received title by Acts of Congress, U.S. Patents, Original Entries by the U.S., swamp land and railroad grants, State of Iowa patents, deeds, or by adverse possession and quiet title actions.

J. These Defendants, or their predecessors, have had possession of the land in dispute for over 90 years. During this period of time, a substantial portion of the land was cleared of trees, levelled, fenced, drained, roads built, and cultivated. It is now valuable and productive farm ground.

K. The Omaha Indian Tribe has never had possession or occupancy of the land in dispute.

L. The United States acts in the capacity of Trustee of the Omaha Indian Tribe's reservation lands. The United States, as Trustee, has never had possession or occupancy of the lands in dispute, nor has it ever made any claim to these lands as Trustee for the Tribe.

M. The Barrett Survey Land was a part of the Omaha Reservation in 1867 when T. H. Barrett made his survey. The Tribe and the United States contended in the trial of the consolidated portion of the case that avulsive river movements resulted in the present location of the Barrett Survey Land on the Iowa side of the river; that the Barrett Survey Land continued to exist and that title remained in the United States as Trustee for the Tribe. The Defendants contended that the river movements were accretive in nature, that the land within the area described by the Barrett Survey was washed away and replaced by land which attached to the Easterly and Northerly High Banks on the river and that, accordingly, title was in the Defendants Wilson, Lakin and RGP, Inc.

O. The Final Judgment and Decree was entered by the Court on May 29, 1987, quieting title to the Barrett Survey Land, except for certain lands known as "Fee Patent Lands", in the United States as Trustee for the Tribe.

The Final Judgment and Decree followed rulings of the Eighth Circuit Court of Appeals in this case that (a) under 25 U.S.C. §194, the burden of proof was

* * *

IV. A. FACTUAL ISSUES

1. Plaintiff's Factual Issues

Plaintiff Omaha Indian Tribe incorporates all of the historical and documentary facts referred to in Plaintiff Tribe's "True and Undisputed Facts" and Plaintiff Tribe's "Factual Issues" set forth in regard to TRACT I, Blackbird Bend Meander Lobe. Plaintiff Tribe asserts title in TRACT II, Monona Bend and TRACT III, Omaha Mission Bend. There follows Plaintiff Tribe's factual issues respecting the morphology of the Missouri River in those areas from 1854 through 1956.

2. Period 1854-1867

The location of the Omaha Indian Reservation was established by Surveyor Barnum for the General Land Office in 1855. A meander line of the west bank of the Missouri River was established by Barrett in 1867. The 1867 Barrett Meander of the right bank and the 1852 Anderson Survey of the left bank defined the location of the Missouri River in the Monona Bend and Mission areas at the time of the signing of the Treaty between the Omaha Indian Tribe and the United States of America on March 16, 1854. The morphology of the Missouri River, particularly respecting TRACT III, Mission Bend, is extremely complex all as will be testified to by Plaintiff Tribe's river morphologists. As a consequence, the summarizations which follow are necessarily generalized.

3. Period 1867-1879

In the period between the establishment of the Barrett Meander Line and the Missouri River Commission Survey of 1879, the Missouri River in the Northern Monona Bend Meander area eroded the left, or east bank of the Missouri River, and accretioned to the west, or Omaha Indian bank, as evidenced by the Missouri River Commission maps for 1879. The Missouri River in Southern Monona Bend area eroded the right or western bank of the Missouri River,

all within the Barrett Meander Line. The imperceptible movement of the Missouri River by erosion of the northern and eastern bank and deposition of accretions to the southern and western bank, all as shown on the Missouri River Commission 1879 maps, extended the Northern Monona Bend area of the Omaha Indian Reservation by the addition of accretions to the Omaha Indian Reservation as meandered by Barrett in 1867. In the Omaha Mission Bend, the Missouri River moved eastward from the Omaha or westerly high bank and the Barrett Meander Line by erosion of the Easterly High Bank and deposition to the Omaha or western bank, all as shown on the 1879 Missouri River Commission Map.

4. Period 1879-1890

The Missouri River by erosion of the eastern and southern banks of the Monona Bend meander lobe moved easterly and southerly eroding land to the east and south and depositing accretions to the Omaha Indian Reservation on the west and north, all as clearly shown on the 1890 Missouri River Commission Survey maps. The Missouri River in the southern Monona Bend area eroded the western bank of the Missouri River all within the Barrett Meander Line. In the Omaha Mission Bend area, the Missouri River continued to erode the Easterly Iowa High Bank and deposit accretions against the right or Omaha bank of the Missouri River.

5. Period 1890-1912

At a time between 1890 and 1912, the Missouri River abruptly avulsed from the Monona Bend Northerly and Easterly High Bank and established a new channel by a point-bar cutoff across the 1890 meander lobe, thus leaving Omaha Indian Reservation lands to the north and east of the left bank of the 1912 Missouri River and extending to the Northerly and Easterly High Banks of Monona Bend established by the 1879 and 1890 Missouri River. In the southern Monona Bend area the E. C. Simmons Survey

of 1912 established the accretions to the Omaha Indian Reservation.

6. Period 1912-1923

Subsequent to 1912, the Missouri River, all within the Omaha Indian Reservation, developed into a braided stream that migrated by changes in the location of the principal channel back and forth across the Omaha Indian Reservation south and west of the Northerly and Easterly High Banks as established by the 1878 to 1890 Missouri River, which is clearly shown on maps of the Monona Bend area prepared by the U.S. Corp of Engineers in 1923. The June 1912 Accretion Survey Maps and the Monona County 1912 Survey establish the location of the Eastern boundary of the Omaha Indian Reservation.

7. Period 1923-1929

From 1923-1929 the Missouri River was a braided stream which flowed within the Omaha Indian Reservation in the Monona and Mission Bend areas. The characteristics and movements are clearly shown on U.S. Corp of Engineers maps for 1927 and 1928.

8. Period 1929-1956

From 1929 to the early 1930s the Missouri River was a braided stream that frequently changed channels all within the Omaha Indian Reservation as shown on the U.S. Corp of Engineers maps for 1930 and 1932. Starting in the mid-1930s the Corp of Engineers initiated a program to control the flow of the Missouri River. Between 1945 and 1956 much of the Missouri River in the Monona and Mission Bend portion of the Omaha Indian Reservation had been controlled.

There is set forth a metes and bounds description of the lands to which Plaintiff Tribe asserts title and is prepared to prove are accretions to the right or Omaha Indian Reservation bank as it pertains to Monona and Omaha

Mission Bends. There is contained in TRACT II, Monona Bend, 4185 acres and in TRACT III, Omaha Mission Bend 725 acres.

**DESCRIPTION OF AREA CLAIMED BY PLAINTIFF
TRIBE IN TRACT II, MONONA BEND AND TRACT III,
OMAHA MISSION BEND**

TRACT II, MONONA BEND:

A parcel of land lying between the 1943 Iowa-Nebraska Compromise Boundary Compact Line and the Easterly Boundary of the Omaha Indian Reservation situated in certain unsurveyed lands and in all or part of Sections 1, 2, 11, 12, 13, Township 84 North, Range 47 West of the 5th P.M., Sections 25, 26, 27, 28, 35 and 36, Township 85 North, Range 47 West of the 5th P.M., Section 8, 16, 17 and 21, Township 25 North, Range 10 East of the 6th P.M., being more particularly described as follows:

Beginning at the intersection of the 1943 Iowa-Nebraska Compromise Boundary Compact Line and the East-West one-quarter Line of Section 13, T-84-N, R-47-W of the 5th P.M., thence Easterly on said East-West one-quarter Line a distance of 1,150' to a point from whence the Northeast corner of said Section 13 bears N. 56° 45' 32" E, based on a True North bearing to which all other bearings in this description are relative, a distance of 4,919', more or less;

Thence N. 2° 00' 46" W, 50.00',
 N. 10° 00' 14" W, 230.49',
 N. 9° 24' 24" E, 292.10',
 N. 15° 45' 56" E, 349.28',
 N. 1° 52' 25" W, 130.38',
 Thence N. 12° 45' 35" E, 365.32',
 N. 7° 43' 10" E, 110.45',
 N. 14° 37' 11" E, 715.89',
 N. 12° 28' 32" E, 578.70',

N. 10° 45' 06" E, 838.63',
 N. 27° 58' 58" E, 465.19',
 N. 11° 24' 20" E, 323.88',
 N. 23° 11' 58" E, 566.48',
 N. 0° 24' 38" W, 390.51',
 N. 6° 40' 11" E, 691.81',
 N. 6° 15' 23" E, 460.98',
 N. 29° 04' 11" E, 691.81',
 N. 58° 46' 09" W, 478.85',
 N. 28° 36' 50" W, 560.80',
 N. 18° 08' 02" W, 651.92',
 N. 76° 01' 14" E, 563.20',
 N. 67° 00' 40" E, 487.54',
 N. 36° 28' 07" E, 626.32',
 N. 43° 36' 24" E, 517.40',
 N. 22° 30' 29" E, 351.14',
 N. 6° 45' 41" E, 312.22',
 N. 4° 58' 45" E, 700.64',
 N. 3° 52' 46" W, 986.15',
 N. 10° 39' 18" E, 1060.66',
 N. 27° 43' 34" E, 939.12',
 N. 10° 23' 23" W, 1,610.74',
 N. 13° 19' 37" W, 842.00',
 N. 16° 33' 41" E, 948.32',
 N. 16° 12' 03" W, 628.98',
 N. 23° 30' 17" W, 478.54',

* * *

V. Legal Contentions

A. PLAINTIFF TRIBE'S LEGAL CONTENTIONS

1. Pursuant to the provisions of the Constitution, the United States of America is Trustee for the Omaha Indian Tribe. That Trust obligation is predicated upon this language from the Constitution:

The Congress of the United States shall have
Power . . . To regulate Commerce with for-

eign Nations, and among the several States, and with the Indian Tribes.¹

It is likewise provided in the Constituion that the Treaty of 1854 entered into by Plaintiff Tribe and the United States of America is declared to be the Supreme Law of the Land.²

2. That trust obligation owing to Plaintiff Tribe by the United States is of the highest dignity as declared by the Supreme Court of the United States in these terms:

In carrying out its treaty obligations with the Indian Tribes, the Government is something more than a mere contracting party . . . It has charged itself with moral obligations of the highest responsibility of trust. Its conduct, as disclosed in the acts of those who represent it in dealing with the Indians, should therefore be judged by ther most exacting fiduicary standards.³

3. The laws of the United States are paramount and controllng in regard to Plaintiff Tribe's claims to title and supersede state law; all as declared by the Supreme Court in *Wilson v. Omaha*:

We are not dealing with land titles merely derived from a federal grant, but with land with respect to which the United States has never yielded title or terminated its interest

. . . .

¹ Constitution of the United States, Article I, Section 8, Clause 3.

² *Ibid.*, Article VI.

³ *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *Wilson v. Omaha*, 442 U.S. 653, 669-671 (1979).

In these circumstances, where the Government has never parted with title and its interest in the property continues, the Indians' right to the property depends on federal law,' wholly apart from the application of state law principles which normally are separately protect a valid right of possession' It is rudimentary that Indian title is a matter of federal law and can be extinguished only with federal consent' The protection that federal law, treaties, and statutes extend to Indian occupancy is 'exclusively the province of federal law.'⁴

4. The lands, title to which is claimed here by Plaintiff Tribe, are accretions to Omaha Reservation land and the Supreme Court, having borrowed Nebraska law, asserts:

Therefore . . . Nebraska law should be applied in determining whether the changes in the river that moved the Blackbird Bend area from Nebraska to Iowa had been avulsive or accretive.⁵

5. Plaintiff Tribe asserts, as a matter of law, predicated on the Treaty of 1854, that it held title to the bed of the 1854 Missouri River to the "centre" of the main stream and that it is entitled to accretions attaching to the right or Omaha bank of the Missouri River at all times which are pertinent thereafter.⁶

⁴ *Wilson v. Omaha*, 442 U.S. 653, 670 (1979).

⁵ *Ibid.*, p. 678.

⁶ *United States v. Flower*, 108 F.2d 298 (CA 8, 1939); *Wilson v. Omaha*, 442 U.S. 653 (1979); and the rationale to which the Supreme Court adhered, having declared the paramountcy of federal law nevertheless borrowed the laws of Nebraska. See *Weemer v. Young*, 167 Neb. 495, 93 N.W. 2d 837 (1958); *Wilcox v. Pinney*, 250 Iowa 1378, 98 N.W. 2d 720-723, et seq. (1959); see 45 Iowa Law Review 945.

6. Plaintiff Tribe applying the laws of Nebraska, which were borrowed by the Supreme Court in *Wilson v. Omaha*, asserts title to the "centre" of the Missouri River in conformity with that law and rejects the laws of the State of Iowa which purport to limit the title of the riparian owner to the high water mark of the Missouri River. That Iowa law likewise declares that title to the abandoned channel of the Missouri River resides in the State of Iowa. Nevertheless, Plaintiff Tribe is not bound by the laws of Defendant Iowa for, in the words of the Supreme Court, in *Wilson v. Omaha*, Plaintiff Tribe's claims to title under its 1854 Treaty are within the "exclusive . . . province of federal law."⁷

7. It would be a totally unacceptable incongruity to declare that accretions to Plaintiff Tribe's Reservation—which are measured by the "borrowed" laws of Nebraska—are subject to the laws of Iowa. That issue will be sharply contested in Plaintiff Tribe's claims to the accretions to the 1937 acres concerning which title has been, quieted in the Tribe as being part of the original Omaha Indian Reservation.⁸

8. Plaintiff Tribe, as a matter of law, holds title to the accretions which extended from the 1854 right or Omaha bank of the Missouri River easterly to the right or Omaha bank of the abandoned channel of the 1875 Missouri River, which were severed from the Omaha Indian Reservation when the Missouri River avulsed westward away from the 1875 channel.⁹

9. Plaintiff Tribe, as a matter of law, holds title to the accretions which attached to the right or Omaha bank of

⁷ Article VI; see *Winters v. United States*, 207 U.S. 564, 576 (1908); *Arizona v. California*, 373 U.S. 546, 599 (1963).

⁸ Final Judgment and Decree, May 29, 1987; *Omaha v. Agricultural*, 854 F.2d 1089, 1096, n. 6, (1988).

the 1867 Missouri River, which extended northerly and northeasterly to the western bank of the 1912 abandoned channel from which the Missouri River avulsed severing lands from the Omaha Indian Reservation.¹⁰

10. Plaintiff Omaha Indian Tribe likewise claims title to the accretions within TRACT II, Monona Bend and TRACT III, Omaha Mission Bend upon precisely the same principles as referred to above for the Blackbird Bend Meander Lobe, all as displayed on Plate I, followings p.

11. Whatever interest Defendant Iowa claims in the bed of the Missouri River or to other lands referred to in its Answer and Counterclaim is constricted to the high-water mark of the present confined channel of the Missouri River.

12. Plaintiff Tribe is not subject to the state laws respecting acquiescence, laches, or statutes of limitations, all as previously decalred by this Court.¹¹

13. Accretions have been defined as occuring:

... where the river's change of channel is caused by a process of erosion or excavation of earth from one bank and deposition of unidentifiable silt and sediments on the other-the land between the old and new channels must be completely disintegrated.¹²

Additionally, an avulsion is a sudden and preceptible loss or addition to land by the action of the stream or by the sudden change in the bed or course of the stream. The difference between an avulsion and accretion consists of the accretion being done by an imperceptible loss from the land of one, and increment to that of the other; and the other—avulsion—in which the change is sudden and can be

¹⁰ *Ibid.*

¹¹ See this Court's Order dated April 5, 1976, in granting Tribe's Motion for Partial Summary Judgment.

¹² *Omaha v. Wilson*, 614 F.2d 1153, 1157 (CA 8, 1980).

ascertained and measured. However, identifiable land in place is not the criterion for the establishment of an avulsion but rather is an element that could be taken into consideration in determining if an avulsion has transpired.¹³

14. Plaintiff Tribe does not have the burden of proof in these proceedings by reason of 25 U.S.C. 194 and cannot be subjected to a jury trial under the circumstances of these cases. The principles adhered to by this Court in its April 5, 1976 Order in the Barrett Meander Line litigation were gravely in error in constricting Plaintiff Tribe's claim to the Barrett Meander Line and purporting to change Plaintiff Tribe's quiet title action to an action in ejectment.

15. All of the lands, title to which is claimed by Plaintiff Tribe in this litigation, are accretions to the Omaha or right bank of the Missouri River, which replaced all of the lands title to which is claimed by the Defendants. As a consequence, the titles claimed to those lands by the Defendants were destroyed simultaneously with the destruction of the lands.¹⁴

Plaintiff Omaha Indian Tribe sets forth as a legal conclusion it claims to accretions to the 1937 acres of land within the Barrett Meander Line, title to which was quieted in Plaintiff Tribe by this Court's May 30, 1987 Final Judgment and Decreee, without proof of an avulsion, pred-

¹³ *Ibid.*

¹⁴ *Wemmer v. Young*, 157 Neb. 495, 93 N.W. 2d 837, 848 (1958); *Wilcox v. Pinney*, 250 Ia. 1378, 98 N.W.2d 720, 723, *et seq.* 91959; See 45 Ia.Law Review, 945; Vol. 5A, Commentaries on the Modern Law of Real Property Thompson, Sec. 2562, p. 32, *et seq.*; "Erosion and Return. title is gained by accretion, lost by erosion, and unchanged by avulsion." Also numerous other decisions from both Nebraska and Iowa adhering to the principle, as summarized by Thompson, citing *Pinney v. Wilcox*, that "Title lost by erosion is not regained when the accretion from the other shore recovers the old boundary."

icated upon this express language of the Court of Appeals in OMAHA IV:

Our judgment in this appeal has no bearing whatsoever on the Tribe's claim to any land outside the boundary of the original reservation which is defined by the Barrett Survey. The judgment in this instant case neither prevents the Omaha Indian Tribe from prosecuting nor disposes of the Tribe's pending action to recover accretions to tribal lands against those defendants who now occupy land within the Blackbird Bnd area but outside the boundary of the Barrett Survey area or to damages for trespass to those lands.¹⁵

Plaintiff Tribe further asserts that its reliance upon the last-quoted excerpt recognizing Plaintiff Tribe's right to offer proof respecting Plaintiff Tribe's accretions does not in any sense constitute an abandonment of Plaintiff Tribe's assertion that 25 U.S.C. 194 is applicable here and the burden of proof by that Act of Congress has been placed upon the Defendants in this litigation.

V. B. LEGAL CONTENTIONS OF DEFENDANT AGRICULTURAL

A. Land that has been allotted to individual Indians is no longer tribal land or part of the reservation. The fee is in the allottee subject only to restrictions on alienation. *United States v. Minnesota*, 113 F.2d 770, 773 (8th Cir. 1940).

B. Once allotted land is conveyed by patent in fee, the allottee is subject to state law. 25

¹⁵ *Omaha v. Jackson*, 854 F.2d 1089, 1096, n. 6 (CA 8, 1988).

U.S.C. §349; *Dillon v. Antler Land Company of Wyola*, 507 F.2d 940 (9th Cir. 1974).

C. Iowa law applies directly to the title dispute, or if federal law applies, the law of Iowa must be borrowed as the rule of decision.

